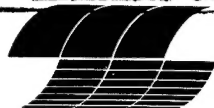
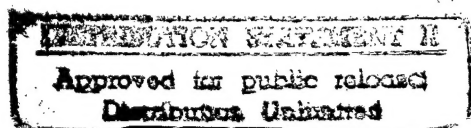
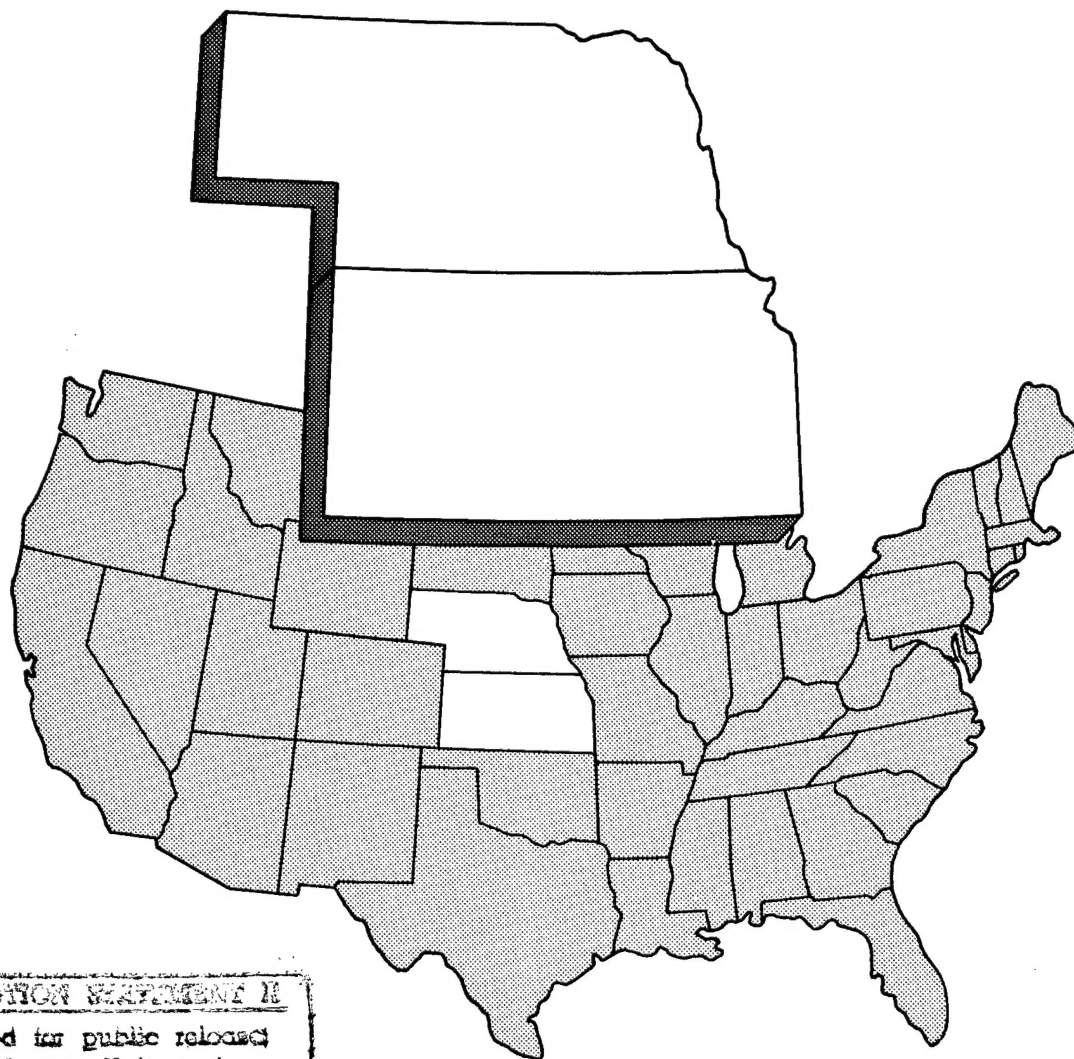


# OPPORTUNITIES TO PROTECT INSTREAM FLOWS IN NEBRASKA AND KANSAS



Interagency Energy-Environment Research and Development Program  
Office of Research and Development • U. S. Environmental Protection Agency

Fish and Wildlife Service

U.S. Department of the Interior

19970318 093

FWS/OBS-83/02  
February 1983

OPPORTUNITIES TO PROTECT INSTREAM FLOWS  
IN NEBRASKA AND KANSAS

by

J. David Aiken  
3400 Dudley Street  
Lincoln, NE 68503

Contract No. 14-16-009-79-100  
Water Resources Analysis Project

Project Officer

Berton L. Lamb  
Cooperative Instream Flow Service Group  
Western Energy and Land Use Team  
U.S. Fish and Wildlife Service  
Drake Creekside Building One  
2627 Redwing Road  
Fort Collins, CO 80526

Performed for  
Western Energy and Land Use Team  
Division of Biological Services  
Research and Development  
Fish and Wildlife Service  
U.S. Department of the Interior  
Washington, DC 20240

This report should be cited as:

Aiken, J. D. 1983. Opportunities to protect instream flows in Nebraska and Kansas. U.S. Dept. Int., Fish Wildl. Serv. FWS/OBS-83/02. 57 pp.

## FOREWORD

In Opportunities to Protect Instream Flows in Nebraska and Kansas, Mr. Aiken provides the reader with a basic survey of State prerogatives and programs that may be used to protect the instream uses of water. Because of the interest and responsibilities of State fish and game agencies and other conservation organizations, most of these opportunities are related to fish and wildlife habitat. However, there are many other instream uses considered, including hydroelectric power production, recreation, navigation, downstream delivery, and waste load assimilation. The purpose of this document is to illustrate methods to protect these instream uses within the context of existing rules and regulations.

The Western Energy and Land Use Team, Division of Biological Services, U.S. Fish and Wildlife Service, has published a number of similar documents in the past. Information is now available for 28 western and midwestern States (Table 1).

Even though Mr. Aiken paid close attention to statutes, this document is not intended as a legal reference. It is designed to be a planning tool to survey current State programs, compare approaches to instream use protection, and index a preliminary evaluation of the costs and benefits of a wide range of programs. Mr. Aiken has provided a summary table for each State, which serves as an index to available opportunities. We anticipate that these tables will be the reader's most valuable guide to these reports.

In some reports, opportunities in each State are presented in a single document, but, in several publications, reports on States from the same geographical region are combined. The complete list of reports in this series is displayed in Table 1. The combination of State reports presents an opportunity for easy comparison of specific programs. This is particularly useful because of the wide variety of instream flow protection programs or possibilities.

The primary purpose of this series of documents is to point out the opportunities in instream flow management which currently exist so that planners and managers can anticipate development, plan appropriate programs, and evaluate the costs and benefits of certain courses of action. In addition, the reports are brief histories of the level of success of various State programs. The use of this information can be a significant cost saving to planners and managers.

In summary, each document has an Executive Summary which discusses its purpose, uses, and limitations. Each document also has separate information tables (Tables 2 and 3) which summarize the contents for each State. It is



hoped that the research represented in these documents will provide the kind of overview and preliminary evaluation that will ease the burden of State, local, or Federal planners and managers as they seek to meet their increasingly complex responsibilities.

Table 1. Publications in the opportunity series.

Title	Publication Number
Instream Flow Strategies for Arizona	FWS/OBS-78/35
Instream Flow Strategies for California	FWS/OBS-78/36
Instream Flow Strategies for Colorado	FWS/OBS-78/37
Instream Flow Strategies for Idaho	FWS/OBS-78/38
Instream Flow Strategies for Montana	FWS/OBS-78/39
Instream Flow Strategies for Nevada	FWS/OBS-78/40
Instream Flow Strategies for New Mexico	FWS/OBS-78/41
Instream Flow Strategies for North Dakota	FWS/OBS-78/42
Instream Flow Strategies for Oregon	FWS/OBS-78/43
Instream Flow Strategies for South Dakota	FWS/OBS-78/44
Instream Flow Strategies for Utah	FWS/OBS-78/45
Instream Flow Strategies for Washington	FWS/OBS-78/46
Instream Flow Strategies for Wyoming	FWS/OBS-78/47
Opportunities to Protect Instream Flows in Alaska	FWS/OBS-82/33
Opportunities to Protect Instream Flows in Nebraska and Kansas	FWS/OBS-83/02
Opportunities to Protect Instream Flows in Michigan and Wisconsin	in preparation
Opportunities to Protect Instream Flows in Minnesota and Iowa	FWS/OBS-83/07
Opportunities to Protect Instream Flows in Texas, Oklahoma, and Arkansas	in preparation
Opportunities to Protect Instream Flows in Georgia	in preparation
Opportunities to Protect Instream Flows in Missouri	IFG Working Paper 308.16
Hawaiian Water Rights and Instream Flows	IFG Working Paper 308.3

## EXECUTIVE SUMMARY

### OBJECTIVES

This document combines the efforts of several individuals, agencies, and organizations toward a common objective: the identification; description; and preliminary evaluation of promising opportunities for protecting instream uses of water under existing law in Nebraska and Kansas.

This report is intended for the use of planning and management personnel who need an overview of potential opportunities for preserving instream flows. It is not intended to replace or challenge the advice of agency counsel, and it is not written to provide legal advice. Instead, it is designed as a guide for the person trying to find his way among sometimes bewildering Federal and State statutes and administrative practices. This report is not, and should not be taken as, official policy or prediction of future actions by any agency. It is simply a summary of some potential opportunities for protecting instream flows.

Toward these objectives, the U.S. Fish and Wildlife Service, through its Water Resources Analysis Project, contracted with Dr. Mary Ray White to identify and describe these opportunities under State laws and current State administrative practice. The project had two phases. In Phase I, Dr. White identified potential opportunities in each State being considered. These descriptions were reviewed for accuracy and utility by a wide range of State and Federal personnel. In Phase II, Dr. White and her associate, J. David Aiken, prepared a report for each State. Each document has undergone extensive review by State and Federal personnel.

### BACKGROUND CONSIDERATIONS

Both State and Federal agencies have important roles to play in water management, particularly in instream flow preservation. The summaries offered here are not intended to suggest that Federal instream flow decisions will or should replace current State water management systems. It is very important for Federal employees to recognize that Federal water policy requires deferral to State water management policy and statutes. In addition, U.S. Department of the Interior employees should recognize that they are required to follow the water policies of the Secretary of the Interior.

In addition to deferring to State water management law, Federal employees should recognize that a close working relationship with State agencies is often the most practical way of getting things done. Resources are almost always limited and, in some cases, gathering and developing information, as required by these opportunities, may be beyond the financial power of the

agency most concerned. As a result, agencies and individuals should learn to cooperate with similarly oriented private, State, and Federal organizations to ensure success.

Many of the opportunities described in this booklet are frequently used and will be familiar to the reader. Some of them include activities that are required of U.S. Fish and Wildlife Service field personnel. Examples of these activities may be given, while no examples are necessary for others.

Federal employees should be particularly cautious when using unusual or untried approaches and should refer legal questions to the office of their Regional Solicitor or General Counsel. Close cooperation with the Office of the Solicitor or agency counsel will result in fewer lawsuits and more successful results overall.

The reader who wishes to protect or augment an instream flow should begin by looking at the physical and legal circumstances of the whole stream. A planner or manager should consider all types of land and water interests involved. The stream should be examined both up and downstream of the reach of interest. Downstream interests should be considered because often they have statutory or contractual power to hold water instream. This survey should include ownership, possession, and control of lands and waters, and the types of use to which the lands and waters are presently being put, such as agriculture, planned development, wilderness, or industry. It is important to remember that contracts or leases may be held by other organizations and individuals. In addition, government agencies may have authority over the land and water. Potential governing agencies are many and diverse, ranging from the Federal government to special districts and municipal bodies.

Often there is more than one way to solve an instream flow problem. When given a choice, the planner or manager should seek the least expensive, least disruptive, and simplest solution to the problem. In some cases, this may mean having a conversation with a landowner or local administrator, sending a letter to the owner or lessee of land and water, or simply arranging a meeting between two water users who could stagger their withdrawals or in some other way provide for a stream.

Offering information on instream flow needs to other agencies of State or Federal government is complex and often provided for by specific statutes. The most risky, complex, and expensive approach to protecting streams is the use of lawsuits. In some cases, litigation may be a necessary part of protecting a right and cannot be avoided. When possible, the manager should stay out of the courts. Lawsuits are expensive, and their outcome is often unpredictable.

In using this report, the reader should be aware of its purpose and limitations. First, only a few of many possible opportunities are described herein. The user should exercise initiative, judgment, and creativity in dealing with any specific situation. Second, this report should be used only as a starting point. In any situation related to the acquisition of water rights, legal advice should be sought. This report should in no way be construed as a substitute for the opinion of a private attorney, attorney general, or agency counsel. Third, this report is neither a policy nor a decision

document; it is simply a collection of opportunities which appear to have utility in a variety of situations.

The purpose of this booklet is to encourage cooperative and innovative thinking by all persons interested in instream flows for fish and wildlife, recreation, and watershed management at Federal, State, or local levels of government, as well as private individuals and wildlife organizations. Many talented people want to protect instream flows; their cooperation in a variety of approaches will be necessary to solve the problem.

Table 2. Opportunities for protecting instream flows in Nebraska.

Title	Identification			Application		
	General description	Applicable situations	Initiation		Implementation	
			Parties	Actions	Parties	Expenditures
Consideration of the Public Interest in Evaluating Appropriation Applications (see page 2)	Neb. Dept. of Water Resources could consider instream values in evaluating the public interest in appropriation proceedings. Neb. Rev. Stat. 216-234	When a proposed appropriation of surface water would, if allowed, jeopardize instream values.	Neb. Dept. of Water Resources; any individual or organization.	Evaluate appropriation application; offer information to DWR regarding how the proposed appropriation would affect instream values.	Neb. Dept. of Water Resources; any individual or organization. Approve, disapprove or condition appropriation in DWR proceeding; appeal adverse DWR decision.	Participation in administrative proceedings; data collection and analysis regarding instream values; possible litigation expenses.
Reservoir Operation Requirements to Protect Fish Life (see page 5)	Reservoir operators are required to release enough water to maintain fish life. Neb. Rev. Stat. 37-106	When water impoundment adversely affects fish life by reducing streamflow.	Neb. Game and Parks Comm'n; any individual or organization.	Evaluate whether surface water impoundments adversely affect fish life; request GPC to enforce fish life protection authorities regarding reservoir operations.	Game and Parks Comm'n. Require reservoir evaluation (water releases) to protect fish life.	Evaluation and enforcement expenses.

Table 2. (Continued)

Title	Identification		Application			
	General description	Applicable situations	Initiation		Implementation	
			Parties	Actions	Parties	Actions
State Water Planning and Development (see page 6)	Instream values could be protected in State water planning and development activities. Neb. Rev. Stat. 2-1507(6), State cost-sharing assistance. 2-3263, et seq.	When water projects jeopardizing instream values are designed or evaluated for State cost-sharing assistance.	Neb. Natural Resources Comm'n; any individual or organization.	Design proposed water projects; evaluate requests for State financial assistance for water development; request NRC to consider instream values in its project design and funding activities.	Neb. Natural Resources Comm'n.	Design proposed water projects; approve or disapprove requests for State financial assistance for water development.
Nebraska Game and Parks Commission Property Acquisition and Management (see page 8)	GPC has broad authority to acquire property with instream values for fish, wildlife, and recreational purposes. Neb. Rev. Stat. 37-401, et seq.	When property with instream values may be used for purposes that would jeopardize instream values.	Neb. Game & Parks Comm'n; any individual or organization.	Evaluate property for GPC acquisition; request GPC to require property for fish, wildlife, and recreation.	Neb. Game & Parks Comm'n.	Acquire property with instream values for GPC purposes.
						Property evaluation and acquisition costs.

Table 2. (Continued)

Title	Identification		Application			
	General description	Applicable situations	Initiation		Implementation	
			Parties	Actions	Parties	Expenditures
State Protection of Endangered or Threatened Species (see page 10)	State agencies are required to use their authorities to conserve threatened and endangered species. Neb. Rev. Stat. 37-430, et seq.	When activities of or authorized by State agencies may jeopardize threatened or endangered species.	State agency contemplating activities affecting endangered species. Neb. Game & Park Comm'n; any individual or organization.	Request GPC assistance in evaluating impact of proposed action on endangered species; request State agency to modify proposed activity to avoid jeopardizing endangered or threatened species; request GPC to enforce its endangered species protection authority.	Neb. Game & Parks Comm'n.	Evaluation of impact of proposed activity on threatened and endangered species.  Advise State agencies regarding impact of proposed activities on threatened or endangered species.
Water Pollution Controls (see page 11)	Neb. Dept. of Environmental Quality may stop activities that interfere with instream values by altering biological integrity of stream.	When activity would interfere with instream values through altering a stream's integrity (e.g., through reducing streamflow) where designated use is for fish, wildlife, or recreation.	Neb. Dept. of Environmental Quality; any individual or organization.	Evaluate whether activity or proposed activity would interfere with stream's biological integrity; request DEC enforcement of water quality regulations.	Neb. Dept. of Environmental Control.	DEC evaluation and enforcement costs.  Order cessation of activities interfering with biological integrity of stream and instream values.



Table 2. (Continued)

Title	Identification		Application			
	General description	Applicable situations	Initiation		Implementation	
			Parties	Actions	Parties	Expenditures
Natural Resources District Programs (see page 12)	NRD's may acquire land and water rights for fish, wildlife, and recreation. Neb. Rev. Stat. 2-3213, et seq.	When acquisition of land or water rights would protect instream values.	NRD; any individual or organization.	Evaluate land and/or water right acquisition for fish, wildlife, and recreation; request NRD acquisition of land and/or water right acquisition.	NRD.  Acquire land and/or water right for fish, wildlife, and recreation.	NRD costs of property acquisition and evaluation.
Readjudicate Appropriative Water Rights (see page 13)	DMR could readjudicate water rights to require more efficient water use. Neb. Rev. Stat. 46-204, et seq.	When improving water use efficiency would make water available for instream purposes.	DMR; any individual or organization.	Evaluate whether appropriations should be re-adjudicated to meet "good husbandry" requirements; request DMR to enforce its responsibilities.	NWR.  Readjudicate appropriations to enforce "good husbandry" requirements.	DWR investigation and readjudication proceedings.

Table 2. (Continued)

Title	Identification		Application		
	General description	Applicable situations	Initiation		Implementation
			Parties	Actions	
Exercise of Administrative Discretion in the Administration of Appropriative Surface Water Rights  (see page 15)	DWR could consider instream values in administering appropriative water rights. Neb. Rev. Stat. 46-234, et seq.	When proposed appropriative surface water right activities may jeopardize instream values.	DWR; any individual or organization.	Evaluate whether DWR; any proposed activity would jeopardize instream values; request DWR to consider instream values in administering appropriations.	Approve, disapprove, or condition proposed activity; participate in DWR proceedings; present information regarding impact of proposed activity on instream values; appeal adverse DWR decision.  DWR proceedings and participation in proceedings; data collection and evaluation; possible litigation costs.
Water Right Cancellation  (see page 18)	DWR may cancel unused surface water appropriations. Neb. Rev. Stat. 46-229.	Appropriation cancellation may make streamflow available for instream uses.	DWR; any individual or organization.	Evaluate whether DWR. appropriation cancellation is warranted; request DWR to exercise its cancellation authorities.	Hold cancellation proceedings and cancel appropriations when necessary.  DWR costs of investigating cancellations and conducting proceedings.

Table 2. (Continued)

Title	Identification		Application			
	General description	Applicable situations	Initiation		Implementation	
			Parties	Actions	Parties	Expenditures
Acquisition of Instream Flow Appropriations (see page 20)	Instream appropriations may be acquired to protect instream values.	When sufficient unappropriated streamflow is available to protect instream values.	Prospective instream appropriators.	Apply to DWR for instream appropriation.	Instream appropriation applicant; DWR.	Application costs; data collection; administrative proceedings.
Augment Streamflows for Instream Purposes (see page 22)	Ground water or stored surface water could be used to augment streamflow.	Where streamflow is insufficient to maintain instream values.	Any individual or organization.	Evaluate whether flow augmentation is needed and whether a water supply for streamflow augmentation is available.	Any individual or organization.	Acquisition costs.
Lease or Purchase of Appropriations for Instream Purposes (see page 24)	Natural flow appropriations may be purchased or leased to augment streamflows.	When streamflow is insufficient to maintain instream values.	Any individual or organization.	Evaluate whether streamflow augmentation is needed and whether appropriation is available for purchase or lease.	Any individual or organization.	Purchase or lease costs.
						Purchase or lease costs.

Table 2. (Concluded)

Title	Identification		Application			
	General description	Applicable situations	Initiation		Implementation	
			Parties	Actions	Parties	Expenditures
Surface-Ground Water Conflicts (see page 25)	When ground water with- draws reduce streamflows, those seeking to protect in- stream flows may take the ground water user to court.	When ground water with- draws jeopardize in- stream values.	Any individual or organization.	Evaluate whether ground water withdrawals are interfering with instream values.	Any individual or organiza- tion.	Sue ground water user to have withdrawals stopped.  Data gathering and evalua- tion; litiga- tion costs.
Riparian Water Rights (see page 27)	Owners of legally ripar- ian land may go to court to maintain in- stream values.	When activities reduce stream- flows adjacent to legally riparian land.	Owner of land that is legally riparian.	Evaluate whether up- stream activi- ties interfere with riparian streamflows.	Owner of land that is legally riparian.	Sue to have activities interfering with riparian stream- flows stopped.  Evaluation and litigation costs.
The Public Trust Doctrine (see page 49)	State actions adversely affecting public instream values may be challenged ad- ministratively or in court.	When State actions threaten public instream values.	Any individual or organization; Nebraska Atty. General.	Intervene in administrative proceedings to protest actions threatening instream values.	Any individual or organiza- tion; Nebraska Atty. General.	Costs of intervening in administrative proceedings; litigation costs.  Challenge in court State actions threaten- ing public instream values.

Table 3. Opportunities for protecting instream flows in Kansas.

Title	Identification		Application			
	General description	Applicable situations	Initiation		Implementation	
			Parties	Actions	Parties	Expenditures
Legislative Designation of Minimum Streamflows (see page 31)	The legislature may designate minimum streamflows which are then not available for appropriators. K.S.A. 82a-703a	Where unappropriated water is available to meet instream flow requirements.	Kansas Water Authority.	Prepares State water plan which includes instream flow recommendations.	Kansas legislature; Kansas Chief Engineer.  Adopts minimum desirable streamflow as part of State water plan. Withdraws minimum streamflows from appropriation.	Study costs; legislative costs; administrative costs.
State Water Rights Discretionary Authority (see page 34)	Chief Engineer can protect instream values in granting appropriations. K.S.A. 82a-711	Where proposed appropriations would impair public instream values.	Kansas Chief Engineer; any person.	Evaluates whether proposed appropriation would interfere with public instream values.	Kansas Chief Engineer.  Denies or conditions appropriations to avoid interfering with public instream values.	Administrative costs.
Reservation of Stored Waters (see page 35)	Stored water could be reserved for release to maintain instream flows. K.S.A. 82a-934	Where minimum streamflows have been identified in State water plan and where stored water is available to meet instream flow needs.	Kansas Water Resources Authority, Kansas legislature.	Identifies and designates instream flows in State water plan.	Kansas Water Resources Authority.  Reserves or purchases water in reservoirs for instream flow maintenance.	Cost of acquiring stored water.

Table 3. (Continued)

Title	Identification		Application			
	General description	Applicable situations	Initiation		Implementation	
			Parties	Actions	Parties	Expenditures
Appropriation Cancellations (see page 36)	Abandoned appropriations can be cancelled by the Kansas Chief Engineer. K.S.A. 82a-718	Where appropriations, if resumed, would interfere with instream flows.	Any person.	Notify the Chief Engineer of abandoned appropriation.	Kansas Chief Engineer. Cancel abandoned appropriations.	Cost of cancellation proceedings.
Appropriative Water Use Efficiency Requirements (see page 37)	Water use efficiency requirements could reduce the amount of streamflow diverted by appropriators. K.S.A. 82a-707	Where reducing appropriative surface water withdrawals would improve instream flows.	Any person.	Notify the Chief Engineer of inefficient appropriative water uses.	Kansas Chief Engineer. Reduce the quantity of an appropriation to require greater water use efficiency.	Cost of appropriation modification proceedings.
Water Quality Regulations (see page 39)	Water quality regulations could prevent activities interfering with a stream's biological character. K.S.A. 65-171d	Where activities interfering with a stream's biological character adversely affects instream values.	Any person.	Notify the Secretary of Health & Environment of activities interfering with a stream's biological character.	Kansas Secretary of Health & Environment. Order cessation of activities interfering with stream's biological character.	Enforcement costs.

Table 3. (Continued)

Title	Identification		Application			
	General description	Applicable situations	Initiation		Implementation	
			Parties	Actions	Parties	Expenditures
Fish and Game Habitat Acquisition (see page 40)	The Kan. Fish & Game Comm'n may acquire property (including water rights) with instream values.	When property acquisition would help meet Kansas Fish & Game Comm'n responsibilities.	Kansas Fish & Game Comm'n.	Evaluate whether property with instream values is available.	Kansas Fish & Game Comm'n.	Property evaluation and acquisition costs.
Land Acquisition for Recreation (see page 41)	The State Park & Resources Authority may acquire, with legislative approval, property with recreational, scenic, or historical values.	When acquisition of property with instream values would further State Park & Resources Authority program responsibilities.	Kansas State Park & Resources Authority.	Evaluate whether property suitable for State Park & Resources Authority purposes is available.	Legislatively authorize State Park & Resources Authority property acquisition.	Property evaluation and acquisition costs.
Municipal Parkland Acquisitions (see page 42)	Property may be acquired by cities for recreational purposes. K.S.A. 12-1301, 12-1306	When property with instream values is suitable for municipal parks.	Municipality.	Evaluate whether property suitable for recreational purposes is available.	Acquire property with instream values for recreational purposes.	Property evaluation and acquisition costs.

Table 3. (Continued)

Title	Identification		Application			
	General description	Applicable situations	Initiation		Implementation	Expenditures
			Parties	Actions		
Instream Appropriations (see page 44)	Public agencies can attempt to acquire instream appropriations.	Where instream appropriation would help meet agency responsibilities.	Public agencies with instream flow related responsibilities.	Apply for instream flow appropriation.	Kansas Chief Engineer.  Approves or disapproves application for instream appropriation.	Application costs, administration costs, possible litigation costs.
Streamflow Augmentation (see page 45)	Streamflow could be augmented with stored water or ground water.	Where streamflow augmentation would protect instream values.	Any person.	Evaluate whether water is available to augment streamflow.	Acquisition of water supply for streamflow augmentation; notify Chief Engineer of augmentation plan.	Water supply evaluation and acquisition costs.
Purchase of Surface Water Appropriation Permits (see page 47)	Attempts could be made to purchase appropriations and convert then to instream uses. K.S.A. 82a-701g	Where conversion of appropriation to instream use would improve instream flows.	Any person.	Evaluate whether appropriation is available for conversion to instream use.	Purchase and conversion of appropriation to instream use; approval of appropriation modification by Chief Engineer.	Appropriation evaluation and acquisition costs; appropriation modification costs.



Table 3. (Concluded)

Title	Identification		Application			
	General description	Applicable situations	Initiation		Implementation	
			Parties	Actions	Parties	Actions
The Public Trust Doctrine (see page 49)	State actions adversely affecting public instream values can be challenged administratively or judicially.	When State actions threaten public instream values.	Any person, Kansas Attorney General.	Intervene in administrative proceeding where public instream values are threatened.	Any person, Kansas Attorney General.	Challenge in court State actions adversely affecting public instream values.
						Intervention in administrative proceeding costs, litigation costs.

## CONTENTS

	<u>Page</u>
FOREWORD.....	iii
EXECUTIVE SUMMARY.....	vi
PART I: NEBRASKA.....	1
ADMINISTRATIVE OPPORTUNITIES TO PROTECT INSTREAM VALUES.....	2
PRIVATE OPPORTUNITIES TO PROTECT INSTREAM VALUES.....	20
JUDICIAL DOCTRINES FOR PROTECTING INSTREAM VALUES.....	27
PART II: KANSAS.....	30
LEGISLATIVE DESIGNATION OF MINIMUM STREAMFLOWS.....	31
ADMINISTRATIVE OPPORTUNITIES TO PROTECT INSTREAM VALUES.....	34
PRIVATE OPPORTUNITIES TO PROTECT INSTREAM VALUES.....	44
PART III: PUBLIC TRUST DOCTRINE.....	49

PART I: NEBRASKA

## ADMINISTRATIVE OPPORTUNITIES TO PROTECT INSTREAM VALUES

Nebraska water allocation statutes do not provide explicit procedures for acquiring water rights specifically for instream purposes. Numerous opportunities exist, however, to protect instream values through the exercise of administrative discretion, both through the acquisition of land and water rights and through administrative approval or disapproval of activities affecting instream values.

The instream flow protection opportunities discussed in this section are not exclusively administrative in that many of the opportunities relate to administrative proceedings in which private individuals, private associations, or other public agencies can participate. Similarly, the private opportunities and judicial doctrines discussed later in this report include approaches that administrative agencies can attempt in order to protect instream values.

### CONSIDERATION OF THE PUBLIC INTEREST IN EVALUATING APPROPRIATION APPLICATIONS

#### Opportunity

The Director of the Nebraska Department of Water Resources (DWR) could meet his constitutional and statutory obligation to consider the public interest by protecting instream values when authorizing surface water appropriations [Nebraska Constitution, Article XV, § 6; Neb. Rev. Stat. §§ 216-235, 46-233 to 46-243].

#### Background

An appropriation permit is required from the DWR Director: (1) before water from a stream can be used; (2) before water from a stream can be impounded; and (3) before impounded water can be used. In considering water right (appropriation) applications, the Director is required to consider the public interest and to deny applications that are contrary to the public interest. In exercising this authority, the Director can: (1) disapprove appropriations that will interfere with instream values; (2) approve activities on the condition that they do not interfere with instream values; or (3) defer a decision until additional information regarding instream values is available.

In meeting his responsibility to protect the public interest in evaluating appropriation applications, the Director has no explicit statutory guidance regarding what factors should be weighed in making the determination. This means that the legislature has given the Director the initial responsibility

to determine the factors that will be considered in the public interest determination and how those factors will be weighed. The Director can consider instream values as part of the public interest review. If the Director does not do so, persons seeking protection of instream values may persuade the Director to do so by intervening and participating in application proceedings. The ultimate (and, at this time, unanswered) issues are: (1) whether instream values must be considered in the public interest determination; and (2) how instream values will be weighed against appropriative water uses.

### Example

Instream flow review initiated by DWR. The DWR Director could, as part of a standard public interest review of appropriation applications, consider the impact of the proposed application on instream values. Historically, the DWR has not conducted public interest review of proposed appropriations or a review of impacts on instream values on its own initiative. The DWR has assumed that if no one challenged the proposed appropriation, it was, therefore, in the public interest. In a recent decision, however, the Nebraska Supreme Court ruled that the DWR was required to consider the public interest in evaluating applications. The DWR, as a result of this decision, may adopt internal public interest review procedures for all application proceedings, but has not yet done so [*Little Blue Bird v. Lower Platte North NRD*, 206 Neb. 534, 294 N.W. 2d 598 (1980)].

The DWR has developed an administrative procedure whereby the Nebraska Game and Parks Commission (GPC), or others, has the opportunity to comment on appropriation applications that may adversely impact any use of Nebraska streams, including fish, wildlife, and, perhaps, recreation. This procedure has been implemented, but it is too soon for its effectiveness to be evaluated. The fact that such an informal procedure has evolved suggests that the DWR is willing to cooperate with parties interested in evaluating the impacts of appropriation on instream values.

Instream flow review initiated by third party. Assuming that the DWR Director does not consider instream flow impacts as part of a standard administrative public interest review (as has historically been the case), third parties can intervene in application proceedings to raise the instream flow issue. The first step in this procedure is for persons interested in this information to obtain notice from the DWR of pending appropriation applications. If anyone (e.g., a private individual, a private association or organization, or a public entity) objects to the proposed appropriation and its approval, they can request a public hearing to demonstrate why the appropriation should be disapproved or conditioned to protect instream values. If the Director grants the public hearing request, the objector can present testimony about why the proposed appropriation will adversely affect instream values and be detrimental to the public interest. The applicant will have an opportunity to present testimony supportive of the proposed use. The Director then decides whether: (1) to approve the appropriation; (2) to condition approval on protection of instream values in the public interest; (3) to disapprove the appropriation; or (4) to defer the decision until additional information regarding instream values is available. The Director's decision can be appealed to the Nebraska Supreme Court.

This action has been attempted with mixed success. Third parties have intervened in appropriation proceedings but have failed to present concrete evidence that the damage to instream values they fear will, in fact, occur. Not surprisingly, these challenges failed because of a lack of evidence. This illustrates the important point that unsupported assertions that adverse consequences will result from a proposed appropriation will not persuade an administrative decisionmaker.

The appropriate kind of testimony to present in such circumstances is illustrated by information offered by the GPC in objecting to a time extension to complete an appropriation on the Snake River. The GPC used streamflow data for July, August, and September (the period during which withdrawals would be made) and compared the fish habitat available for juvenile and adult brown trout, the primary sport fish species in that stream segment. The GPC then recalculated how much habitat would be diminished each month if the proposed water rights were exercised during July through September. The reduction in juvenile brown trout habitat was 8, 10, and 12%, respectively, while the reduction in adult brown trout habitat was 17, 18, and 20%, respectively. This type of information is specific enough that it cannot be ignored by an administrative decisionmaker. In addition, the applicant will have to go to considerable expense to successfully refute such information.

The GPC information included both hydrological and biological components. In this instance, the GPC had both the data and the staff capability to analyze the data. In some cases, this type of data is available from public agencies, such as the U.S. Geological Survey or the GPC. However, hydrological and/or biological expertise is needed to interpret the data relative to instream flow impacts of an appropriation. Public agency staff may be available to do the data interpretation in some cases. In other cases, however, the intervenor may need to hire an expert to interpret the available data or, if available data are inadequate, to collect the data. These factors affect the expense of intervening in appropriation procedures.

If intervention is contested to any extent, as seems likely, an attorney may be needed to assist the technical experts in presenting their information to the DWR and in contesting any contradictory evidence presented by the applicant. This increases the cost of intervention in appropriation proceedings.

Instream flow review required by court order. Assuming that the DWR Director declines to consider instream values in water right application proceedings, the questions are: (1) whether instream values must be considered in the public interest determination; and (2) how instream values will be weighed against other water uses. A DWR order approving a diversion of water from the Platte River to irrigate land in the Blue River basin is the first formal expression of how the DWR addresses the instream flow issue. The order did not define specifically what considerations should be included in the public interest review, but implied that any issue raised in administrative hearings should be considered in the public interest determination. If this view is sustained by the Nebraska Supreme Court, it suggests that any public interest review will have to be initiated by a third party, rather than by the DWR.

The issue of how instream values will be evaluated relative to out-of-stream water uses was not raised in the DWR order, because the DWR ruled that the transbasin diversion would have only minimal effects on instream values. The DWR will have to evaluate tradeoffs if it is persuaded that a proposed appropriation will interfere with instream values.

#### Sources

Mahoney, E. 1980. Letter from Director, Nebraska Game and Parks Commission, to John Neuberger, Director, Nebraska Department of Water Resources, 31 October.

### RESERVOIR OPERATION REQUIREMENTS TO PROTECT FISH LIFE

#### Opportunity

Operators of reservoirs, from which impounded water is returned to the stream, are required to ensure that sufficient water is returned to preserve fish life. The one exception to this requirement is when unusual natural circumstances make its fulfillment impractical. The Nebraska Game and Parks Commission is responsible for enforcing this requirement [Nebraska Revised Statutes § 37-106].

#### Background

Nebraska statutes require that reservoirs be operated to protect fish life by returning water to the stream in quantities sufficient to protect fish life. This requirement is suspended, however, when unusual natural circumstances make its fulfillment impractical. The statute does not specify what constitutes sufficient water to preserve fish life or what unusual natural circumstances would justify its suspension. These determinations will be made by the GPC initially, but can be appealed by a reservoir operator.

#### Example

The GPC has attempted to negotiate reservoir water releases with project operators with limited success. The GPC, however, has not attempted to enforce the statutory requirement. This approach can be implemented in two ways: (1) by the GPC establishing instream flow requirements before the issuance of a storage appropriation permit; and (2) by negotiating new instream flow releases with current storage appropriators.

The most desirable time to establish instream flow requirements for fish protection is before the storage water right has been acquired. This gives the potential appropriator sufficient notice regarding instream flow requirements to incorporate them into the project design. The GPC can work with the Nebraska Natural Resources Commission (NRC) and the DWR on incorporating instream flow requirements into project planning procedures and appropriation procedures, respectively. If the NRC and DWR incorporate the instream flow requirements into their administrative procedures, GPC enforcement of this requirement will be much easier.

Regarding existing storage appropriations, the GPC can inform the storage appropriator of the statutory instream flow requirement and attempt to negotiate a reservoir operation plan that will accommodate both instream flow needs and project objectives. The GPC can offer financial assistance to compensate for any lost revenues or to help project water users (e.g., irrigators) adjust to reduced water availability (through, e.g., irrigation scheduling) due to instream flow requirements. Financial assistance is not required by statute, however. If the storage appropriator refuses to cooperate with the GPC, the GPC can establish instream flow requirements on its own and enforce them by court order, if necessary.

### Evaluation

This approach may be a fruitful one for protecting instream flows for fish maintenance where new reservoirs are involved. The lack of detail regarding the statutory requirements, however, poses some problems. It is unclear, for example, whether the amount of water required to be released for instream uses is the amount of inflow to the reservoir or the amount that is necessary to protect fish life. Similarly, the statute is unclear regarding what constitutes an unusual natural circumstance. No inflow to the reservoir could be a basis for not invoking instream flow requirements, but this is unclear. The statute does not address how conflicts between instream flow requirements and project water demands are to be resolved.

### Sources

Erlong, G. 1981. Nebraska Game and Parks Commission, 21 January. Interview.

## STATE WATER PLANNING AND DEVELOPMENT

### Opportunity

The Nebraska Natural Resources Commission can consider protection of instream values in State water planning and development, ensuring that instream values are protected in State and Federal water development projects [Nebraska Revised Statutes §§ 2-1507(6), 2-3263 to 2-3272].

### Background

The NRC is responsible for State water development and planning and for the administration of the Nebraska Resources Development Fund (NRDF). Regarding State water planning, the NRC is responsible for planning, in cooperation with Federal water development agencies, projects (reservoirs) for irrigation, flood control, recreation, and related purposes. The purpose of State water planning is to ensure that Federal water development activities are consistent with State natural resources goals and objectives.

Related to its State water planning responsibilities, the NRC has responsibilities for administering the NRDF. The purpose of the NRDF is to provide State financial assistance to State agencies and political subdivisions for programs or projects for a variety of purposes, including: (1) flood control; (2) irrigation; (3) fish and wildlife preservation; (4) outdoor recreation; and (5) soil and water conservation. The NRC is authorized to use the NRDF to



purchase storage rights in water development projects. Two of the factors whose consideration is required in evaluating requests for NRDF funds whether or not adverse environmental impacts of the proposed program or project are minimized, and the project or program is consistent with existing State land or water plan.

### Example

State water planning and development programs have not been used to directly protect instream values for fish, wildlife, or recreational purposes other than flat-water recreation. However, these programs could be used: (1) to identify, in State water planning efforts, stream reaches with significant instream values; (2) to require State and Federal water development projects to protect instream values identified in the State water plan; (3) to acquire storage appropriations or augment streamflows to protect instream values; and (4) to authorize NRDF programs to protect instream values.

Identification of instream values. In its water planning efforts, the NRC identifies, in cooperation with other State agencies and the public, stream segments with instream values. Protection of these identified segments are made a condition of any water development activity evaluated through State water planning processes.

The basis for such a program is being developed in an evaluation of instream flow policy alternatives, prepared as part of Nebraska's State Water Planning and Review Process for the Nebraska legislature. Part of this study is the identification and evaluation of instream flow needs Statewide. Regardless of whether the legislature elects to enact instream flow legislation, the instream flow needs information can be used by NRC (and other State agencies) in water development planning and related activities.

Water project design. In planning State and Federal water development projects, the NRC can use available instream flow needs information to design projects to accommodate or enhance instream values. While Federal projects are not legally required to be designed to State specifications, Federal construction agencies will often do so to ensure State political support for project development.

Storage reservation for instream purposes. The NRC is authorized to use NRDF funds to purchase storage rights in water impoundment projects. The NRC can acquire storage rights to protect instream values; their stored water can be released to augment streamflows as necessary to protect instream values.

Authorization of instream flow protection programs. NRDF funds can be acquired for programs or projects for fish and wildlife preservation and recreation. State agencies or political subdivisions can begin to protect instream flows by proposing to use NRDF to purchase storage rights or acquire land with significant instream values.

### Evaluation

As presently constituted, the NRC primarily represents natural resource districts (NRD). To a significant extent, NRC programs will reflect NRD wishes unless the legislature specifies otherwise. Because NRD's are strongly

oriented towards "production agriculture" as a result of NRD board election procedures, the NRC is likely to reflect this production agriculture orientation. As long as this is true, programs protecting instream values are most likely to be implemented where they are compatible with production agriculture. Where protection of instream values conflict with the perceived needs of production agriculture, preference is likely to be given to the latter.

### Sources

Nebraska Natural Resources Commission. 1980. Policy Issue Report on Instream Flows: Preliminary Report. March.

## NEBRASKA GAME AND PARKS COMMISSION PROPERTY ACQUISITION AND MANAGEMENT

### Opportunity

The GPC is authorized to acquire property through a variety of programs for fish, wildlife, and recreational purposes. These properties can have instream values and, in addition to properties already acquired by the GPC, can be managed to protect these instream values [Nebraska Revised Statutes §§ 37-401, 37-401, 37-216.08, 37-435(1); 81-815.26, 37-1302; 81-805.02; 37-422, 37-411, 37-412 to 37-421].

### Background

The GPC is authorized to acquire property in a variety of ways, including: (1) acquiring, with the Governor's consent, property for fish and game reserves and sanctuaries; (2) leasing or purchasing on a willing seller/willing buyer basis, property for wildlife lands and habitat areas, if the GPC's habitat plan has received legislative approval; (3) acquiring property for the conservation of nongame, threatened, or endangered species; (4) acquiring, by condemnation and with legislative approval, property for scenic, historical, recreational, and fish and wildlife purposes and unique natural areas; (5) acquiring, after the GPC's outdoor recreation plan has received legislative approval, property for outdoor recreation purposes; and (6) acquiring land for GPC purposes by land exchanges. The GPC is also authorized to: (1) establish fish and game reserves and sanctuaries on State land; (2) cooperate with the U.S. Fish and Wildlife Service in establishing cooperative wildlife restoration projects and cooperative fish restoration and management projects; (3) administer lakes, the shorelines of which were meandered by Federal land surveys; and (4) manage legislatively established game refuges and preserves.

In acquiring and managing these properties, the GPC can utilize a variety of strategies that may protect instream flows, including: (1) cooperate with the DWR in evaluating the impacts of proposed appropriations on instream flows for fish, wildlife, or recreational purposes; (2) intervene in appropriative water right proceedings to seek protection of instream flows for fish, wildlife, or recreational purposes; (3) attempt to acquire instream appropriations for fish, wildlife, or recreational purposes; (4) purchase or acquire appropriative storage rights for instream flow augmentation; (5) cooperate with the NRC in water development project planning to protect instream values; (6) cooperate with the NRC in reserving reservoir space for instream flow augmentation; (7) identify habitat containing instream values critical to the

conservation of nongame, threatened, or endangered species and cooperate with State agencies to ensure that agency actions do not destroy or modify such critical habitat; and (8) cooperate with the Department of Environmental Control in identifying the impacts on instream values for fish, wildlife, or recreation for State certification of Federal dredge and fill permits and issuance of State permits to discharge wastes into watercourses.

### Example

The GPC has participated in one DWR proceeding regarding an application to extend the time for completing an appropriation. The GPC presented information that the water right would reduce juvenile and adult habitat for the brown trout and concluded that permitting the appropriation to be completed would not be in the public interest. The DWR declined to consider the GPC's information, because the DWR felt the only basis for denying an application to extend time for completing an appropriation was failure by the appropriator to attempt completion of the appropriation in good faith. The DWR, in effect, however, gave the GPC a standing invitation to comment regarding proposed appropriations. Such a cooperative arrangement could result in administrative establishment of instream flows, if the GPC is able to persuade the DWR that some appropriations should be denied in the public interest to protect instream values for fish, wildlife, or recreational purposes.

A logical extension of this approach is for the GPC to identify critical instream flow needs for fish, wildlife, and recreational purposes and present this information to the DWR. If the GPC can persuade the DWR that critical streamflows should be, in effect, reserved from appropriation in the public interest for fish, wildlife, or recreational purposes, the DWR can issue an order that some portions of streamflow in identified river segments are not available for appropriation. The DWR has administratively closed streams to appropriation of natural flow during the irrigation season, not to protect instream values, but because the DWR determined that unappropriated water was not available for additional water rights. This suggests that similar action can be taken, regarding instream flows, to help prospective appropriators more accurately evaluate the availability of streamflow for appropriation.

A second opportunity to protect instream values is to apply for or purchase storage rights for instream flow augmentation. The GPC has acquired storage rights but has not used them to release water to augment streamflows.

### Evaluation

The GPC has broad authorities to protect instream values, but these authorities are largely untested. Because the GPC is charged with administrative responsibility for protecting fish, wildlife, and recreational values in Nebraska, it is the logical entity to pursue opportunities to cooperate with other administrative agencies to protect instream values. In addition, the GPC's authority to acquire and manage property for fish, wildlife, and recreational purposes gives it additional opportunities to protect instream values.

### Sources

Mahoney, E. 1980. Letter from Director, Nebraska Game and Fish Commission, to John Neuberger, Director, Nebraska Department of Water Resources, 31 October.

## STATE PROTECTION OF ENDANGERED OR THREATENED SPECIES

### Opportunity

The GPC is authorized to designate species as threatened or endangered and to identify habitat that is critical to the existence of endangered or threatened species. State agencies are required to: (1) utilize their authorities to conserve endangered or threatened species; (2) ensure that actions authorized, funded, or implemented by State agencies do not jeopardize endangered or threatened species; and (3) ensure that actions authorized, funded, or implemented by State agencies do not result in the destruction or modification of critical habitat for endangered or threatened species [Nebraska Revised Statutes § 37-430 to 37-438].

### Background

The Nebraska Nongame and Endangered Species Conservation Act authorizes the GPC to: (1) identify wildlife or wild plant species that are endangered or threatened; (2) establish regulations governing the capture, possession, sale, exportation or shipment of endangered or threatened nongame wildlife; (3) identify habitat critical to the continued existence of threatened or endangered species; and (4) acquire habitat, including land and aquatic habitat or interests, for the conservation of nongame, threatened, or endangered species. Species identified as threatened or endangered pursuant to the Federal Endangered Species Act are considered threatened or endangered under the Nebraska Endangered Species Act. More significantly, State agencies are required to: (1) consult with the GPC regarding use of their authorities to conserve endangered or threatened species; (2) ensure that actions authorized, funded, or implemented by State agencies do not jeopardize the existence of endangered or threatened species; and (3) ensure that actions authorized, funded, or implemented by State agencies do not result in the distribution or modification of habitat determined by the GPC to be critical to the existence of threatened or endangered species.

The GPC has adopted regulations regarding the capture, possession, sale, and transportation of threatened or endangered species. The GPC has not, however, officially identified critical habitat or actions that could jeopardize threatened or endangered species.

### Example

Opportunities to protect instream values related to maintaining threatened or endangered species and their habitat have not been undertaken in Nebraska. Two general approaches are possible, however. First, the GPC can identify habitat critical for threatened and endangered species (including habitat containing instream values), present this information to State agencies, and work with them to prevent or modify activities that will harm critical habitat. State agency actions that can interfere with critical habitat include: (1) authorization of natural flow appropriations or storage appropriations by the Nebraska Department of Water Resources; (2) DWR authorization of dam construction; (3) issuance of permits to discharge waste into streams by the Nebraska Department of Environmental Control (DEC); (4) DEC certification of Federal dredge and fill permits; (5) water resources development project planning activities of the Nebraska Natural Resources Commission; (6) NRC

grants under the Nebraska Resources Development Fund; and (7) construction activities of State agencies, including the Nebraska Department of Roads. Second, all State agencies must consult with the GPC and exercise their administrative authorities to conserve threatened and endangered species, even in the absence of the GPC's identification of critical habitat.

For example, suppose the DWR is asked to approve a water right application that might affect threatened or endangered species habitat. If the GPC has identified the stream at issue as being critical habitat, the DWR Director can ask the GPC to evaluate the impact of the proposed appropriation on the habitat and recommend whether or not the appropriation should be granted. If critical habitat has not been designated, the DWR can notify the GPC of pending appropriations.

### Sources

Nebraska Game and Parks Commission. 1977. Nebraska's endangered and threatened wildlife. Lincoln, NE. Nebraska Game and Parks Commission.

## WATER POLLUTION CONTROLS

### Opportunity

The Nebraska Department of Environmental Control (DEC) can stop activities that interfere with instream values by altering the biological integrity of a stream [Nebraska Revised Statutes §§ 2-3229, 2-3224, 2-3225, 2-3213 to 2-3222].

### Background

Under the Nebraska Environmental Protection Act, the DEC is authorized to prevent pollution of surface water when streams fall below the standards established by the Environmental Control Council (ECC). Pollution is defined to include "the manmade or man-induced alteration of the physical, chemical, biological, and radiological integrity of water." Water quality standards have been defined by the ECC, with standards differing by stream segment based on the uses assigned to that segment. The uses identified include: full body contact, partial body contact, fish and wildlife protection, drinking water supply, agricultural, and industrial. However, the water quality standards do not indicate the quality of water that is needed to maintain these uses in a stream segment.

### Example

The DEC has not yet enforced the antipollution requirement affecting the biological integrity of stream segments with assigned fish, wildlife, or recreational uses. The first step is for DEC to determine whether or not the diversion of water or other activity adversely affects the biological integrity of a stream segment designated for fish, wildlife, or recreational use. This requires both hydrological and biological expertise. The second step is to issue an administrative order to the individual or entity to refrain from the pollution activity until sufficient streamflow is available to support the designated uses and pollution is no longer a problem. The DEC order can be challenged in court. This procedure will be easier to implement if DEC

identifies in its water quality standards, the amount of water needed during different times of the year to protect the designated uses.

### Evaluation

The pursuit of this approach will generate political pressures on the DEC to not exercise its administrative discretion to prevent water pollution. In addition, a person whose right to divert water from a stream is altered could sue the DEC on the theory that the DEC regulations deprived him of his property right to divert water pursuant to his appropriation. The issue would be whether or not the DEC action was a reasonable regulation to protect the public health, safety, and welfare. If so, no compensation would be required. If not, the DEC would be required to compensate landowners for interference with their appropriative rights.

## NATURAL RESOURCES DISTRICT PROGRAMS

### Opportunity

The NRD is authorized to, among other things, develop and manage habitat for fish and wildlife and park and recreation facilities. Districts can exercise eminent domain authority and can acquire water rights for such purposes [Nebraska Revised Statutes §§ 2-3229, 2-3224, 2-3225, 2-3213 to 2-3222].

### Background

NRD's are local districts with broad natural resource responsibilities, including soil and water conservation, water supply for a variety of purposes, flood control, range management, and ground water management. NRD's are governed by a locally elected board of directors, who hire a full-time manager. NRD's are financed by local property taxes, although State funds are available for water development and soil conservation purposes.

NRD's can acquire property by purchase or by condemnation for fish, wildlife, and recreation purposes. Statutory language further suggests that NRD's can purchase or appropriate water rights for fish, wildlife, and recreation purposes, although considerable legal uncertainty exists regarding whether or not instream appropriations can be obtained and appropriative natural flow (streamflow) water rights can be purchased or leased. The NRD can, however, acquire land with instream values, purchase stored water to release for instream purposes, or construct water impoundment facilities to store water for instream purposes.

### Example

The NRD's have provided cost sharing assistance to landowners to manage land for wildlife habitat purposes and constructed reservoirs for fishing and flat-water recreation purposes. An example of the latter action is the Muskantine Reservoir, sponsored by the Lower Elkhorn NRD in Madison County. The NRD's have not yet, however, purchased land for its instream values or used stored water for instream purposes.



Purchase of land with instream values, or acquiring or storing water for instream purposes, requires the approval of the NRD board, which also must approve the budget to acquire such land or stored water. As a practical matter, this means persuading the NRD board members that instream values are worth the cost relative to other NRD programs or electing NRD board members committed to protecting instream values.

### Evaluation

Enhancement of agricultural productivity through soil and water conservation programs (construction of sediment and water retention reservoirs) is a primary NRD activity. The program emphasis on agriculture is likely to continue because State statutes establishing NRD board election procedures ensure that rural areas have significantly greater NRD board representation than their population warrants. Activities protecting instream values are more likely to be undertaken by NRD's if they can be integrated into agricultural programs.

## READJUDICATE APPROPRIATIVE WATER RIGHTS

### Opportunity

The DWR can readjudicate natural flow irrigation (i.e., nonstorage) water rights to require a higher degree of water use efficiency. The water saved, which is not required by other appropriators, can be used for instream purposes [Nebraska Revised Statutes §§ 46-204, 26-2031].

### Background

Surface water appropriators who irrigate are subject to vague water use efficiency requirements. Appropriators are generally subject to the limitations of beneficial use, which is not defined under Nebraska law. Nebraska statutes, however, limit surface water irrigators (excluding users of stored water) to up to three acre feet of water per acre, but not to "exceed the least amount of water that experience may indicate is necessary, in the exercise of good husbandry, for the production of crops" [Nebraska Revised Statutes §§ 46-204, 46-2031]. The good husbandry language implies that the 1895 legislature set three acre feet per acre as an upper limit on the amount of water that could be used for irrigation purposes, but also intended that, if irrigation practices were improved so that less water was required, appropriations should be made on the basis of those improved practices. The advantage of doing so is that more water is available for other uses. The DWR, however, routinely grants irrigation appropriations for three acre feet per acre.

If the DWR were to grant new irrigation rights for less than three acre feet per acre, this might reduce the adverse impact of such diversions on instream values. The more significant issue, however, is whether currently authorized irrigation appropriations can be modified by reducing the quantity of water. If this is done, more streamflow might be available for instream uses, if it is not needed by other appropriators. The statute, however, is ambiguous regarding whether or not the good husbandry requirements apply only to new appropriations or can be applied to existing appropriations. Some

court opinions suggest that any good husbandry provisions apply only to appropriations acquired after 3 April 1895.

### Example

The DWR can consider irrigation efficiency requirements as part of a nonstorage appropriation application for irrigation purposes, thereby considering irrigation efficiency in making the water allocation. The DWR traditionally has not done so.

If a proposed irrigation water right will adversely affect instream values, those seeking protection of instream values can, in addition to requesting that the appropriation be denied in the public interest, request that less than three acre feet per acre be granted, if the reduced diversions will reduce the adverse impact on instream values. This process requires notification of the proposed appropriation and participation in the DWR administrative proceeding. The objector is required to persuade the DWR that less than three acre feet per acre of water is needed to efficiently irrigate the land under consideration.

If existing irrigation appropriations interfere with instream values, those interested in protecting instream values can request that the DWR Director reduce the quantities of water that appropriators are entitled to use. If the DWR Director declines to reduce irrigation allocations, the Director's decision can be appealed to the court. The court considers whether or not: (1) existing appropriations are wasteful, considering improved irrigation methods; (2) the DWR Director is authorized by statute to reduce the quantity of streamflow to which irrigation appropriators are entitled in order to achieve a more beneficial use of water; and (3) such a reduction will make more water available to surface water users, including for appropriative and instream flow purposes. The latter will require hydrologic documentation.

### Evaluation

Implementation of this approach is difficult. Nebraska water law, and western water law in general, appears to require a strict and careful water use to ration a scarce and valuable resource. In practice, however, considerable inefficiency is tolerated, in part because requiring irrigators to improve irrigation efficiency increases the cost of irrigation to individuals. A related consideration is that streamflow traditionally has been considered wasted unless used out of the stream.

Nebraska statutes require the DWR Director to consider irrigation efficiency in making surface water allocation decisions regarding new appropriations. However, the Director traditionally has not done so, and his failure to do so has not been challenged. The more complicated question is whether Nebraska statutes authorize or require the Director to reduce existing appropriations for irrigation purposes to improve water use efficiency. Irrigators can argue that once the allocation is made, it is final, even if irrigation practices improve in the future. A further limitation of this approach is that it may not apply to stored surface water for irrigation. Finally, the hydrologic impacts of reduced irrigation diversions can be beneficial to instream value protection in some circumstances, but be detrimental in others. The reduction in irrigation diversions will affect the timing and



amount of surface and subsurface return flows to the stream. The identification of these changes in instream regimes requires fairly detailed hydrological and perhaps geological analyses. A related issue is that the increased stream-flow may lead to additional downstream diversions by appropriators.

#### Sources

Nebraska Constitution, Art. XV, § 6.

Enterprise Irrigation District v. Willis, 135 Neb. 827, 284 N.W. 326 (1939).

### EXERCISE OF ADMINISTRATIVE DISCRETION IN THE ADMINISTRATION OF APPROPRIATIVE SURFACE WATER RIGHTS

#### Opportunity

The Director of the DWR can exercise his discretion in administering appropriative surface water rights to protect instream values in the public interest [Nebraska Revised Statutes §§ 46-234, 46-242, 46-250, 46-801, 46-807, 46-257].

#### Background

The DWR Director has broad discretion over a wide range of water right administrative responsibilities, including: (1) granting time extensions to complete ("perfect") appropriations; (2) approving water exchanges between appropriators; (3) approving changes in the location of water diversions; (4) approving changes in canal location; (5) approving changes in storage site locations; (6) granting permits to drain or withdraw water from a lake; (7) approving dam construction plans; and (8) granting permits to construct a mill or milldam on a stream. In exercising these authorities, the Director can disapprove activities that will interfere with instream values, approve activities on the condition that they do not interfere with instream values, or defer a decision until additional information regarding instream values is available.

The Director has little legislative guidance regarding what factors should be considered in making decisions. This means that the legislature has given the initial responsibility to the Director to determine the factors that need to be considered in making a decision and how those factors will be weighed. The Director can, on his own initiative, include the public interest in these determinations (even though not explicitly required by statute to do so) and consider instream values as part of that public interest review. If the Director does not consider the public interest and instream values in making decisions, those seeking the protection of instream values may persuade the Director to do so by intervening and participating in administrative proceedings. The ultimate (and, at this time, unanswered) issues are, however, whether or not the constitutional and statutory provisions requiring the Director to consider the public interest in appropriation application proceedings establish, by implication, a general public interest requirement for all appropriation proceedings, whether or not instream values must be considered in the public interest determination, and how instream values will be weighed against appropriative water uses.

## Example

Public interest determination initiated by the DWR. The DWR Director can, as a part of standard administrative review procedures, consider the impact of the proposed action on instream values. Historically, the DWR has not done so. If a cooperative procedure develops between the DWR and the GPC, whereby the GPC reviews the impact of proposed appropriations on fish and wildlife resources, the DWR will have taken the first step towards an internal public interest review. Unanswered questions regarding this procedure, however, include what weight the DWR Director will give to GPC recommendations and whether or not the procedure will be limited to appropriation applications only, where a public interest review is required, or will include other appropriation proceedings, where a public interest review is not required.

Public interest determination initiated by third party. Assuming that the DWR Director does not consider instream flow impacts as part of a standard administrative public review (as has historically been the case), third parties can intervene in administrative proceedings to raise the instream flow and public interest issues. The first step in this procedure is to obtain notice of DWR administrative proceedings related to time extensions to complete water rights and water exchanges. Persons interested in this information should contact the DWR. If a private individual, private association, or public entity objects to the proposed action, they can request an opportunity to demonstrate why the proposed action should be disapproved or conditioned to protect instream values. If the Director grants the objector an opportunity to be heard, the objector can present information regarding how the proposed action will adversely affect instream values and be detrimental to the public interest. This typically requires the services of a hydrologist or engineer, a biologist, and an attorney. The applicant will have an opportunity to present information in support of the proposed action. The Director then decides to: (1) approve the proposed action; (2) condition approval on protection of instream values in the public interest; (3) disapprove the proposed action; or (4) defer the decision until additional information regarding instream values is available. The Director's decision can be appealed to the Nebraska Supreme Court.

This procedure has been attempted once in Nebraska. The GPC filed written objections to a request for a time extension to complete an appropriation. The GPC stated that the completed appropriation would threaten trout habitat in the Snake River and concluded that the public interest would be best served by disallowing the request for a time extension in completing the appropriation. The DWR responded that the only basis for disapproving a request for a time extension was if the appropriator was not proceeding in good faith to complete the appropriation on schedule. The DWR did, however, offer to cooperate in allowing the GPC to comment on appropriation applications affecting fish and wildlife resources in the future. It is unclear how effective this cooperative program will be in protecting instream values and whether or not it will be limited only to appropriation applications or to appropriation proceedings in general.

Public interest determination required by court. Assuming that the DWR Director declines to consider instream values in appropriation proceedings, the legal questions are: (1) whether or not the constitutional and statutory

provisions requiring the Director to consider the public interest in appropriation application proceedings establish, by implication, a general public interest requirement for all appropriation proceedings; (2) whether or not instream values must be considered in the public interest determination; and (3) how instream values will be weighed against appropriative water uses. None of these issues has been litigated in Nebraska, although the last two are likely to be addressed in an appeal to the Nebraska Supreme Court of a DWR order approving an appropriation of water from the Platte River to irrigate land in the Blue River basin. Opponents of the transfer include instream flow proponents, who are likely to argue that the DWR did not give sufficient weight to instream values in making the public interest determination.

A literal reading of the statutes related to time extensions to complete appropriations, water exchanges between appropriators, and related appropriation procedures could lead to the conclusion that the legislature intended that the public interest be considered only when appropriation applications are filed and that the public interest is to be ignored in all other appropriation proceedings. This conclusion is justified only if the failure of the legislature to explicitly consider the public interest in every statute relating to appropriation procedures is interpreted as an implicit directive to ignore the public interest. Hopefully, this is not the case. A more probable interpretation is that the legislature presumed that the DWR Director would, at his discretion, consider the public interest in making appropriation decisions. Where the failure to consider the public interest results in significant harm to the public interest, however, a court on appeal is likely to imply a requirement that the public interest be considered.

This keys the important question of what constitutes the "public interest." Certain things are obviously not in the public interest, such as activities that threaten public health and safety. Beyond this point, the decision regarding what constitutes the public interest becomes more subjective; i.e., a matter of personal values. The constitutional and statutory public interest provisions do not identify what factors should be considered in making the public interest determination. One way of resolving this issue is to consider legislative enactments that may touch on the public interest issue. If consideration is limited to appropriation statutes, the factors considered in making the public interest determination are limited to an evaluation of competing water uses for domestic, agricultural, irrigation, industrial, and manufacturing purposes. If other related statutes are considered, such as the Nebraska Environmental Protection Act, the Nebraska Endangered Species Act, and the GPC statutes, the factors for consideration are broadened to include water uses for fish and wildlife, recreation, and water quality purposes, among others.

If the Director is required to consider the impact of proposed appropriations on instream values, the next issue is how the Director will choose between the proposed appropriation and the instream use. Again, the public interest provisions give the Director no guidance, although the constitutional and statutory declarations that the use of water for domestic and irrigation purposes is "a natural want" may justify the Director's giving them special consideration. As a practical matter, however, the Director's determination is likely to be based on the facts and circumstances of each case, rather than a statutory heirarchy derived by implication. This issue has not been

litigated in Nebraska, but probably will be raised in the Little Blue appeal described above.

#### Sources

Little Blue NRD v. Lower Platte North NRD, 206 Neb. 535, 294 N.W. 2d 598 (1980).

### WATER RIGHT CANCELLATION

#### Opportunity

Water rights not used for 3 consecutive years can be cancelled by the DWR. Such cancellation may result in more water being available for instream uses [Nebraska Revised Statutes §§ 46-229 to 46-229.05].

#### Background

Surface water rights must be exercised (used) in order to remain valid. If an appropriation is not exercised for more than 3 years during which water was available for use, the appropriation can be cancelled by the DWR after written notice and a public hearing. The rationale for cancelling unused appropriations is that subsequent (junior) appropriators may be misled into believing that more water is available for use than is really the case. If the prior (senior) appropriator resumes water use, junior appropriators may find that less surface water is available than they originally thought, which may have affected investment decisions related to their appropriation.

The practical effect of cancelling a water right is that appropriations junior to the cancelled rights become more senior. This is advantageous, because most surface water right conflicts are resolved on the basis of first in time, first in right. For example, if an appropriator has the fourth priority on the stream (i.e., three appropriators are senior) and one of these appropriations is cancelled, the appropriator then has the third priority on the stream. If the appropriator whose right has been cancelled wishes to resume water use, he must reapply for an appropriation. If a new appropriation is granted, it will have a junior priority and may be the first use discontinued when conflicts develop.

Appropriation cancellation relates to protection of instream values in two ways: (1) stream diversions may gradually be reduced, if the number of appropriators is reduced; and (2) the priority of any instream appropriators becomes more senior. However, appropriation cancellations will not provide an opportunity to protect instream values if the stream is already "over appropriated," in the sense that normal supplies are greater than normal water demands, or if instream appropriations cannot be obtained.

#### Example

Appropriation cancellations are typically initiated by the DWR, which holds cancellation proceedings every fall and winter. The DWR has, however, initiated cancellation proceedings at the request of prospective appropriators who wish to have their relative priority status clarified before they make

investments related to their appropriation. This suggests that the DWR can initiate cancellation proceedings at the request of private parties and that cancellation proceedings can be used to improve or clarify the priority status of an appropriation.

If persons desiring protection of instream values possess information that could lead to cancellation of appropriations, the exercise of which would interfere with instream values, they can give the information to the DWR. If the DWR refuses to initiate cancellation proceedings, the instream flow proponents can appeal the DWR decision in court. The instream flow proponents, however, have to prove in court that the conditions for cancelling an appropriation have been met. A similar procedure can be followed after an instream appropriation has been obtained.

### Evaluation

Appropriation cancellation is most effective when it is used to improve the priority status of instream appropriations. When instream appropriations cannot be obtained, however, cancellation proceedings may not significantly protect instream values especially if the exappropriator reapplies for a new (albeit junior) appropriation.

## PRIVATE OPPORTUNITIES TO PROTECT INSTREAM VALUES

This section discusses private opportunities to protect instream values. The reader should note, however, that these opportunities can be implemented by public agencies as well. A significant related issue is that private associations or individuals may have important opportunities to protect instream values by participating in the administrative proceedings and by initiating litigation pursuant to the judicial doctrines discussed earlier in this report.

### ACQUISITION OF INSTREAM FLOW APPROPRIATIONS

#### Opportunity

Persons desiring the protection of instream values can apply to the DWR for instream flow appropriations (i.e., a right to use water in the stream) (Holmquist 1970).

#### Background

The DWR is authorized to issue natural flow appropriations (i.e., appropriations to use streamflow), storage appropriations (i.e., appropriations to impound streamflow), and storage use appropriations (i.e., appropriations to use impounded streamflow). Appropriations have been acquired primarily for irrigation and power purposes, although some off-stream appropriations have been acquired for fish propagation purposes. Instream appropriations have been acquired for hydroelectric power generation, but no attempts have been made to acquire instream appropriations for fish, wildlife, or recreational purposes.

#### Example

When an individual, natural resource district, private association, or State or Federal agency applies for an appropriation, a written application must be filed with the DWR identifying the location and purpose of use and the quantity of water to be appropriated. Traditionally, the DWR has reviewed such applications and granted them unless the application is deficient or the proposed appropriation threatens public safety (e.g., via an unsound dam). If someone objects to the application, the DWR holds a public hearing, but traditionally has not denied contested appropriation applications except where the DWR felt bound by court decision to do so.

No instream flow appropriations for fish, wildlife, or recreation purposes have been applied for in Nebraska. One reason for this may be statements by DWR officials suggesting that such appropriations could not be acquired

(notwithstanding DWR approval of instream natural flow appropriations for hydroelectric power generation) for fish propagation purposes.

### Evaluation

Uncertainty exists regarding the validity of instream appropriations for fish, wildlife, or recreational purposes, primarily because Nebraska appropriation statutes do not explicitly provide for or preclude such appropriations. Past DWR administrative decisions suggest, however, that such appropriations might be granted, notwithstanding policy to the contrary. The major unresolved questions include whether or not a physical diversion of water from a stream is necessary to obtain an appropriation; natural flow appropriations can be acquired for purposes other than domestic, agricultural, or manufacturing uses; and the quantity of water applied for can achieve the desired use without waste.

Physical diversion requirement. A traditional element of an appropriation is a physical diversion of water from the stream. The historical reason for the physical diversion requirement is that before water right administration systems were developed, the physical diversion of water from a stream was the only way potential appropriators could learn of existing appropriations. The advent of administrative systems for allocating and administering appropriations did away with the necessity of an actual diversion to give notice of existing appropriation, because such notice could be obtained by consulting the State agency's records.

Whether a physical diversion of water is necessary to obtain water rights in Nebraska has not been legally addressed. Appropriation statutes and constitutional provisions do not explicitly require a physical diversion of water from a stream as a condition to obtaining an appropriation, although diversion references are numerous in appropriation provisions. The grant of instream appropriations for hydroelectric power production suggests that the DWR does not interpret Nebraska law as requiring a water diversion to obtain a natural flow appropriation.

Purpose of use. Nebraska statutes do not explicitly limit the purposes for which water can be appropriated, but state that water rights can be acquired for beneficial use. The DWR, however, has informally interpreted preference provisions as limiting the purposes for which natural flow appropriations can be acquired. The preference provisions provide that: (1) conflicts between persons using streamflow for the same purposes will be resolved on the basis of priority (first-in-time is first-in-right); and (2) conflicts between persons using streamflow for different purposes shall be resolved on the basis that domestic uses are preferred over all other uses, and agricultural uses are preferred over manufacturing uses. If appropriations are acquired for nonpreference purposes (purposes other than domestic, agricultural, or manufacturing), the preference provisions do not establish how conflicts between agricultural or manufacturing appropriators and nonpreference appropriations or between nonpreference appropriators using streamflow for different purposes will be resolved. This omission apparently is the basis for the informal DWR opinion that natural flow appropriations can be obtained for domestic, agricultural, or manufacturing purposes only. Nonetheless, the DWR has granted off-stream natural flow appropriations to the U.S. Fish and Wildlife Service for fish propagation purposes. In addition, fish, wildlife, and recreation



uses are among the purposes identified in Nebraska environmental statutes as being beneficial, which suggests that appropriations can be acquired for such beneficial purposes.

Quantity of allocation. An issue likely to be raised regarding instream appropriations for fish and wildlife or recreational purposes is whether or not the quantities of water needed to achieve such purposes are reasonable relative to other water uses. Nebraska appropriation provisions do require, by implication, that water appropriated be used without waste. They also establish good husbandry requirements for natural flow irrigation appropriations. The DWR traditionally has not included such factors when considering appropriation applications, but probably would be justified in considering whether or not the amount of water sought is reasonable as part of the requirement to consider the public interest. Applicants for instream appropriations for fish, wildlife, or recreational purposes, then, should be prepared to document that the water requested for appropriation is absolutely necessary to achieve the purposes of the appropriation and that the purposes of the appropriation cannot be achieved in some other manner. This documentation is likely to require considerable biological expertise to be credible.

#### Sources

Holmquist, J. 1970. Present State policy regarding instream uses. Nebraska Natural Resources Commission. Lincoln, NE. Draft.

### AUGMENT STREAMFLOWS FOR INSTREAM PURPOSES

#### Opportunity

Supplemental water can be obtained for instream flow purposes by purchasing surface water stored in a reservoir or by pumping ground water into a stream. This supplemental water can be used to augment streamflows during low flow periods.

#### Background

No explicit statutory provisions relate to the purchase of stored water from reservoir owners. However, DWR officials have informally indicated that, if stored water is purchased for instream flow purposes, they will prevent other appropriators from diverting that stored water when it is released for instream flow purposes.

No explicit statutory provisions exist regarding the use of ground water to augment streamflow for instream flow purposes. A stream channel can be used as a means of conveying water from one point to another. The DWR has permitted landowners to use a stream to convey ground water for sale to a downstream water user.

#### Example

Releases of stored surface water for instream flow purposes have not been attempted in Nebraska, although the Game and Parks Commission does have storage appropriations. If this approach is attempted, the first step is to negotiate



the purchase of stored water from the reservoir owner (e.g., public power and irrigation district, power district, irrigation district, or natural resources district), making the purchase contingent on the DWR's agreeing to prevent appropriators from diverting the water when it is released. The next step is to notify the DWR of the proposed purchase and release of stored water for instream flow augmentation. If the DWR agrees to prevent appropriators from diverting the water released, the sale can be completed. Finally, the water storage entity needs to be notified when water releases are needed for instream flow augmentation purposes.

It is unclear whether ground water has ever been used to augment stream-flows for instream purposes in Nebraska. The procedure for implementing this approach, however, is similar to that for using stored surface water. If the ground water is purchased, the sale should be contingent upon the DWR's agreeing to prevent appropriators from diverting the ground water from the stream.

### Evaluation

Some uncertainties affect the utility of this approach for protecting instream flows. The principal questions are what constitutes a beneficial use of surface water and whether or not the use of ground water to augment stream-flow for instream purposes constitutes a reasonable use of ground water.

The DWR has informally interpreted Nebraska preference provisions as limiting the purposes for which appropriations can be acquired to domestic, agricultural, and manufacturing purposes. The DWR has interpreted the preference provisions as not applying to stored water, however, and has informally suggested that the purpose of use of stored water is the prerogative of the owner of stored water. This issue has not been resolved statutorily or judicially. Appropriators wanting to divert supplemental ground or surface water used to augment instream flows can argue that water in a stream not used for domestic, or agricultural purposes, is not beneficially used, and, therefore, is subject to the diversion and use by appropriators. If the DWR takes the position that use of ground water or stored surface water for instream purposes is legal, the expense of challenging this ruling would be on the appropriators. It is unlikely that the amount of water to be realized by appropriators in such litigation would be worth the expense. Litigation of this issue by appropriators, therefore, seems unlikely. Even if the litigation was successful, it would be self-defeating because the use of supplemental water for instream flows would stop if the DWR could not prevent its diversion.

The ground water law issue is somewhat different. Nebraska statutes and court decisions do not address the issue of what purposes ground water can be used for, with one exception. Permits for high capacity wells can be obtained in ground water control areas for domestic, agricultural, or industrial purposes only. Beyond this, Nebraska Supreme Court decisions imply that ground water can be used for any purpose if the use is nonwasteful and on land overlying the ground water supply (Aiken 1980). Augmenting streamflow with ground water for instream flow purposes may be challenged in court as being wasteful or nonoverlying. Neither concept, however, has been defined by Nebraska court decision or statute. Ground water users challenging the ground water use of someone else must first demonstrate that they are injured by the ground water withdrawals to which they are objecting. Unless the wells pumping ground water for instream purposes are interfering with ground water production from

other wells, which seems unlikely, no legal injury has occurred, and the ground water use cannot be challenged.

### Sources

Aiken, J. D. 1980. Nebraska groundwater law and administration. 59 Neb. L. Review 917.

Jess, N. J. 1977. Allocation of [surface] water rights in Nebraska by means of appropriative rights. Lincoln, NE. Nebraska Department of Water Resources.

## LEASE OR PURCHASE OF APPROPRIATIONS FOR INSTREAM PURPOSES

### Opportunity

Appropriations can be purchased and the purpose of the appropriation changed to an instream use.

### Background

One opportunity for protecting instream flows is to purchase natural flow appropriations and change the purpose of use to an instream use for fish, wildlife, recreation, or related purposes. The appropriation can be acquired by purchase of the land for which the appropriation was originally acquired or by purchasing an appropriation separately from the land. The absence of specific statutory authority for such appropriations makes this approach subject to some uncertainty.

The basic legal issues related to acquiring instream appropriations by direct application to the DWR relate to this approach as well. The specific issues are whether or not water must be physically diverted from a stream to legally constitute an appropriation and whether or not fish, wildlife, recreation, and related uses of streamflow are beneficial. If these issues are resolved such that instream appropriations are legally possible, three additional issues must be resolved regarding purchasing water rights for instream flows: (1) whether or not an appropriation can be separated from the land for which the appropriation was originally acquired; (2) whether or not the purpose for which an appropriation is used can be changed; and (3) the quantity of water that is transferred when an appropriation is sold.

Separability from land. Nebraska statutes do not address the issue of whether or not appropriations can be separated from the land for which the appropriation was made. The land where water is to be used must be identified in the appropriation application, so that appropriations attach to the land described and are sold along with the land when it is sold. These provisions have received conflicting judicial interpretation: (1) only appropriations acquired prior to 4 April 1895 (the effective date of current appropriation statutes) can be sold separately from the land for which they were acquired; and (2) all appropriations can be sold separately from the land subject to DWR approval. These cases did not deal directly with the question of sale of appropriations, however, so the issue must be considered unresolved.

Change of use and quantity transferred. If appropriations can be sold, the next issue is whether or not the purpose of use can be changed. No statutory provisions or judicial comments address this issue. In other Appropriative Doctrine States, changes in use are allowed if other appropriators are not hurt by the change. In practice, this means that the quantity of water consumed in the original use cannot be increased in the new use so that return flows to the stream are not available to downstream appropriators. (Similar restrictions apply regarding changing the location of use.) If no consumptive use is involved, however, the full amount of the appropriation can be converted to an instream use, which makes more water available to downstream appropriators.

#### Example

Appropriations have not been purchased in Nebraska for conversion to instream water rights. The first step to do so is to negotiate a sale of the water right or land, contingent on DWR approval of the change in purpose of use. The second step is to apply to the DWR to have the purpose of use changed to an instream use. The application (for which DWR forms are not available) should make clear that the proposed change in use will not harm existing appropriations. If the DWR denies the application, the decision can be appealed in court.

#### Evaluation

The legal status of purchasing appropriations and changing the purpose of use is unclear. The advantage of this approach, however, is that, if successful, instream appropriations can be obtained with an early priority date. This represents a more secure water supply for instream purposes, because conflicts between appropriators are resolved on the basis of priority: first-in-time is first-in-right. Purchasing an early priority date may be the only way to use the water rights law to protect instream values in heavily appropriated streams where supplemental water to augment streamflows is unavailable.

#### Sources

Farmers Irrigation District v. Frank, 72 Neb. 136, 100 N.W. 286 (1904).

Farmers and Merchants Irrigation Co. v. Gotenberg Water Power and Irrigation Co., 73 Neb. 223, 102 N.W. 487 (1905).

State v. Birdsong Irrigation District, 154 Neb. 52, 46 N.W.2d 884 (1951).

United States v. Tilley, 124 F.2d 850 (8th Cir. 1941).

### SURFACE-GROUND WATER CONFLICTS

#### Opportunity

Persons seeking to protect instream values can go to court to prevent ground water withdrawals that interfere with instream flows.

## Background

Nebraska water law does not acknowledge that surface and ground water can be hydrologically interconnected, with one minor exception. A permit from the DWR is required to withdraw water for irrigation from a pit located within 50 feet of a stream bank. The DWR can deny the permit if it will interfere with appropriations. Instream appropriators can object to the issuance of such permits, if their rights will be adversely affected.

The question of how to resolve conflicts between surface and ground water users has not been litigated in the Nebraska Supreme Court. The Sioux County District Court has ruled that a ground water irrigator is liable for interfering with agricultural uses of surface water, including loss of subirrigation. The Nebraska Supreme Court has suggested that surface water users are not harmed by insignificant reductions in streamflow, but has not indicated how more substantial conflicts would be resolved.

Persons who have the right to bring suit to stop ground water withdrawals affecting instream values include instream appropriators, purchasers of stored water for instream flow purposes, riparian landowners, and owners of land with instream values, such as the Nebraska Game and Parks Commission.

## Example

Litigation to prevent ground water withdrawals from interfering with instream values has not been attempted in Nebraska. The first step is to demonstrate the legal interest in protecting instream values, such as possession of natural flow or storage appropriations for instream purposes or ownership of land whose value will be diminished if streamflow diminishes. The second step is to prove that ground water withdrawals are reducing streamflow. This requires hydrologic and geologic information and expert interpretation, which can be quite expensive. The third step is to prove how the streamflow reduction adversely affects instream values. This requires biological data and expert interpretation, which may be available from the U.S. Fish and Wildlife Service or the Nebraska Game and Parks Commission. The final step is to persuade the judge that payment of compensation will be inadequate to protect instream values (unless water can be purchased or otherwise obtained to supplement streamflows).

## Evaluation

The legal interrelationship between ground and surface water is unclear in Nebraska. In addition, litigation involving ground water can be expensive because of data requirements and the need for interpretation. For these reasons, litigation to prevent ground water withdrawals from interfering with instream values should probably be viewed as a last resort. Obtaining supplemental water supplies, such as ground water, to augment streamflows is likely to be a less costly means of protecting instream values.

## JUDICIAL DOCTRINES FOR PROTECTING INSTREAM VALUES

This section discusses two judicial doctrines that can be used to protect instream values. The reader should note, however, that courts are passive institutions: A party (whether a private individual, a private association, or a public agency) must initiate a lawsuit before a court can resolve a dispute involving instream values.

It should be noted that judicial review is available regarding most of the private and administrative opportunities to protect instream values discussed in this report. The decision to pursue such a lawsuit necessarily is a major policy question which should be answered by appropriate agency personnel.

### RIPARIAN WATER RIGHTS

#### Opportunity

Owners of land qualifying legally as riparian can sue in court to protest or prevent activities interfering with instream values.

#### Background

Before the adoption of statutes establishing appropriative surface water rights, riparian water rights were established through Nebraska Supreme Court decisions. The riparian doctrine was superseded as the basis for acquiring new rights to use surface water in Nebraska by legislative establishment of appropriative water rights in 1895. However, riparian land is restricted to land that was privately acquired and bordered a stream before enactment of the legislation.

Under the riparian doctrine, landowners whose land borders a stream are entitled to use water from the stream. Under the reasonable use variation of the riparian doctrine, which is followed in Nebraska, riparians can divert water from a stream to use it, although they need not do so. Uses for fish, wildlife, and recreation purposes have been recognized as proper riparian uses in other States, although the question has not been raised in Nebraska.

When conflicts between owners of riparian land arise, there is no clear basis for deciding how the conflict will be resolved. Instead, the court will compare the relative water needs and uses of the parties in light of the available supply and determine whether or not the upper riparian's water use (which is conflicting with the lower riparian's water use) is reasonable. What is reasonable or unreasonable depends on the facts and circumstances of each case, including: (1) the size and character of the stream; (2) the water

uses of other riparians; (3) the season of the year; and (4) the nature of the region. What would be considered unreasonable during a period of normal flow may be considered unreasonable during a drought. Similarly, what is considered reasonable in a humid region might be considered unreasonable in an arid region.

Similar principles are followed in resolving conflicts between appropriators and riparians. The Nebraska Supreme Court has ruled that appropriators are not liable for interfering with a riparian's water use, unless the harm caused by the interference is greater than the benefit achieved by the appropriation. Evaluating the harm to the riparian involves a consideration of: (1) the extent of the harm; (2) the social value attached to the riparian use; (3) the time the riparian use was initiated; (4) the suitability of the riparian use to the stream; and (5) the burden on the riparian of avoiding the harm. Evaluating the benefit achieved by the appropriation involves a consideration of: (1) the social value attached to the appropriative use; (2) the time the appropriation was initiated; and (3) the impracticality of preventing or avoiding the interference. The major difference between conflict resolution among riparians and between riparians and appropriators is that the time of use is a factor for consideration when appropriations are involved.

### Example

Riparian rights have not been used to protect instream values for fish, wildlife, or recreational values in Nebraska, although they have been recognized relative to stock watering, ground water recharge, and subirrigation uses of surface water. If a person initiates litigation as a riparian, the first step is to establish ownership of land that is legally riparian. This involves demonstrating that the land physically borders the stream, that the land was in private ownership on or before 4 April 1895, and that the tract of land has bordered the stream continuously since 4 April 1895 (i.e., has not lost its riparian status by being separated from the stream). Second, the riparian needs to show that the appropriation is interfering or would interfere with the riparian instream use. Finally, the riparian needs to persuade the court that the harm caused by the appropriation's interfering with the riparian instream use is greater than the benefits from the appropriation.

### Evaluation

The riparian doctrine is the one clear basis in Nebraska water law for challenging the adverse impact of appropriations on instream uses. Unfortunately, the riparian doctrine is untested in this regard. The constitutional and statutory declarations that the use of surface water for domestic and irrigation purposes are a "natural want" may put instream values for fish, wildlife, and recreation purposes at a disadvantage, because they do not have constitutional recognition. The past and present attitude that State policy should support irrigation may limit the utility of the riparian doctrine as a means for protecting instream values.

### Sources

Menez v. Coffee, 67 Neb. 500, 93 N.W. 713 (1903).

Wassenberger v. Coffee, 180 Neb. 147, 141 N.W. 2d 738 (1966).

Trelease, F. J. 1957. The concept of reasonable beneficial use in the law of surface streams. 12 Wyo. Law Journal 1.

PART II: KANSAS



## LEGISLATIVE DESIGNATION OF MINIMUM STREAMFLOWS

### OPPORTUNITY

The Kansas legislature can identify a minimum desirable streamflow for a stream as part of the Kansas State water plan. When a minimum streamflow level has been legislatively identified, the Chief Engineer is required to withhold, from appropriation, the amount of water necessary to establish and maintain the minimum streamflow [Kan. Stat. Ann. 82a-703a].

### BACKGROUND

The Kansas Water Office is required to develop a State water plan identifying, among other things, reservoir location [Kan. Stat. Ann. 82a-903, 82a-701]. In formulating this plan, the Water Office is required to consider: "(a) management, conservation, and development ..., (b) benefits to be derived from development of reservoir sites ..., (c) safeguard to public health, aquatic life, and animal life ..., (d) means and methods for protection of aquatic and other wildlife, (e) the interrelationship of groundwater and surface water supplies ..., and (f) other elements" [Kan. Stat. Ann. 82a-907]. After the plan or amendments to the plan have been formulated, they are reviewed by the Kansas Water Authority and presented at public hearings. With approval of the Kansas Water Authority, they are presented to the Governor and Legislature for adoption. The plan is not effective until adopted by the Legislature [Kan. Stat. Ann. 82a-906].

If the approved plan includes minimum desirable streamflows, such streamflows are protected in four ways. First, any activity that may interfere with the approved plan must be evaluated by the Water Authority. After a public hearing, the proposed activity may be approved or disapproved by the Water Authority in accordance with the plan [Kan. Stat. Ann. 908(a)]. Second, any State agency, including the Kansas Fish and Game Commission, can protest, to the Water Authority, any proposed action that may be inconsistent with the approved plan [Kan. Stat. Ann. 82a-908(b)]. Third, the Kansas Water Authority can request that the Kansas Attorney General institute court action to prevent activities that conflict with the plan [Kan. Stat. Ann. 82a-908(d)]. Finally, the Chief Engineer, Division of Water Resources, Kansas State Board of Agriculture, is required to withdraw from appropriation the amount of streamflow necessary to establish and maintain the minimum desired streamflow [Kan. Stat. Ann. 82a-703a]. The Chief Engineer also is required to consider established minimum desirable streamflow requirements when evaluating whether or not a proposed surface or ground water appropriation will prejudicially and unreasonably affect the public interest [Kan. Stat. Ann. 82a-711].

## EXAMPLE

The statute authorizing the identification of minimum desirable streamflow requirements was enacted in 1980. Minimum desirable streamflow requirements have not yet been identified by the Kansas Water Authority for legislative approval. The minimum desirable streamflow recommendations are being prepared by the Kansas Water Office, in cooperation with the Chief Engineer, the Kansas Department of Health and Environment, the Kansas State Park and Resources Authority, and the Kansas Fish and Game Commission. The Kansas Water Office is the staff for the Kansas Water Authority. Recommendations for minimum streamflows for approximately 80 segments are scheduled to be available in late 1982. The report containing these designations will be presented to the Kansas Water Authority, which will make its recommendations to the Kansas legislature. The recommendations will take effect if they are adopted by the legislature.

How the minimum desirable streamflows will be treated by the Chief Engineer is unclear. They will probably be treated as instream appropriations with a priority date the same as the effective date of the statute designating the minimum desirable streamflow. This means that minimum desirable streamflows will be binding only on appropriations initiated after the date the streamflows are established or take effect.

## EVALUATION

The State water planning process is an orderly procedure for identifying instream flow needs. What remains to be seen, however, is the extent to which instream flow needs are identified, whether or not instream flow requirements are legislatively approved, and the extent to which unappropriated water is available to meet specified instream flow needs.

The Kansas Water Office and the Interagency Work Group can be expected to prepare a technically sound set of minimum desired streamflows based on fish, wildlife, recreation, and water quality concerns. How these recommendations will be received by the Kansas Water Authority, however, is unclear. The Water Authority, created in 1981, includes 15 members: one each representing large and small municipal water users; two representatives for ground water management districts; one representative for conservation districts; one representative for industrial water users; one representative for watershed districts; one representative for the general public; two representatives appointed by the Kansas legislature; the State geologist; the Chief Engineer; the director of the Division of Environment of the Kansas Department of Health and Environment; the director of the Kansas Water Office; and the director of the Kansas Agricultural Experiment Station at Kansas State University. Fish, wildlife, and recreational interests are not specifically included in the Water Authority. How sympathetic the Water Authority will be to the designation of minimum desirable streamflows remains to be seen.

The report from the Kansas Water Office to the Kansas Water Authority will be useful to the Chief Engineer in exercising his discretionary authority over water rights. Establishment of minimum desirable streamflows may also enhance opportunities for augmenting streamflows through the purchase of water rights, discussed later in this report.

### Sources

- Gibson, G. 1981. Chief Engineer, Division of Water Resources, Kansas State Board of Agriculture. Personal Communication. 10 July.
- Neubauer, F. 1981. Acting Director, Kansas Water Office. Personal Communication. 10 July.
- Sheets, L. 1981. Associate Hydrologist, Kansas Water Office. Personal Communication. 10 July.

## ADMINISTRATIVE OPPORTUNITIES TO PROTECT INSTREAM VALUES

### STATE WATER RIGHTS DISCRETIONARY AUTHORITY

#### Opportunity

The Chief Engineer can condition or deny permit applications that interfere with public instream values.

#### Background

Surface and ground water can be appropriated in Kansas by applying to the Chief Engineer, Division of Water Resources, Kansas State Board of Agriculture [Kan. Stat. Ann. 82a-703]. The Chief Engineer can reject or require modification of an appropriation application to protect the public interest [Kan. Stat. Ann. 82a-711].

For the last 4 or 5 years, the Chief Engineer has informally established base flow requirements for major Kansas streams. The base flow requirements are based on historical streamflows, as estimated from stream gaging records. The Chief Engineer has, in effect, administratively determined that these streamflows should not be available for appropriation in order to protect the public interest.

This administrative policy is implemented by requiring appropriators to reduce the amount of water requested in their application, if the proposed use will interfere with the base flow. In addition, when withdrawals interfere with base flow levels, the Chief Engineer's office requires appropriators to stop their diversions. Enforcement is accomplished through a complaint system. An individual or organization must file a written complaint with the Chief Engineer's office requesting that appropriators be issued closing orders to stop withdrawals in order to protect the base flow levels.

#### Example

The Kansas Fish and Game Commission applied for a permit to use water from the Arkansas River to augment streamflow into State lakes for recreational purposes (including fish and wildlife). The Chief Engineer required the modification of this application because the proposed appropriation would interfere with the 700 cfs base flow the Chief Engineer has established for the Arkansas River.

#### Evaluation

The baseflow requirement established by the Chief Engineer is a powerful tool that can be used to protect instream values. Effective implementation of

this policy requires sufficient stream gaging stations to provide the streamflow data necessary to establish the base flow requirement. It also requires a streamflow monitoring network so that complaints to the Chief Engineer can be made in a timely fashion in order to require appropriators to stop withdrawals that interfere with base flow levels.

A possible shortcoming of the baseflow requirement is that the quantity of water, in effect reserved from appropriation, is based on streamflow data rather than on evaluation of how much water is needed to protect specified instream values in the public interest. The historical streamflow may not be an accurate measure of the quantity of water necessary to protect public instream values. However, historical streamflows may be the best available estimate of instream flow requirements until more detailed analyses of those requirements can be made. The preparation of recommended desirable minimum streamflows for the Kansas legislature by the Kansas Water Office and the Kansas Water Authority should provide the Chief Engineer with more detailed information on which to establish flow requirements.

A second possible shortcoming of the base flow requirement is the potential for ground-surface water conflicts. Ground water withdrawals may interfere with streamflow by causing ground water recharge from the stream and by intercepting ground water that otherwise would have been discharged into the stream. The Chief Engineer has denied appropriation applications for wells that would interfere with streamflow. The Chief Engineer has not, however, issued "closing orders" to ground water appropriators to protect base flow. Ground water withdrawals may interfere with base flow requirements. If this occurs, the Chief Engineer will need to develop an administrative procedure for determining which ground water appropriators are interfering with base flows, when they should be issued closing orders to cease withdrawals, and when withdrawals can be resumed without interfering with base flows.

Finally, base flow requirements, alone, may not be adequate to protect instream values during drought periods. When this situation occurs, streamflow needs to be augmented in order to protect instream values. Streamflow augmentation opportunities are discussed elsewhere in this report.

#### Sources

Division of Water Resources. 1980. Rules and Regulations, Water Appropriation Act. Kansas State Board of Agriculture. 1 May.

Gibson, G. 1981. Chief Engineer, Division of Water Resources, Kansas State Board of Agriculture. Personal Communication. 10 July.

### RESERVATION OF STORED WATERS

#### Opportunity

When surface water reservoirs are planned and designed, water from such reservoirs may be allocated for instream flow purposes [Kan. Stat. Ann. 82a-938, 82a-939].

## Background

The Kansas Water Authority is responsible for identifying the location of reservoirs to be constructed in Kansas [Kan. Stat. Ann. 82a-903]. The Water Authority is also authorized to purchase storage space in Federal reservoirs to accomplish the objectives of the State water plan [Kan. Stat. Ann. 82a-934]. If minimum desirable streamflows are identified in the State water plan, the Water Authority can purchase storage space in Federal reservoirs or reserve space in State reservoirs to meet the instream flow requirements.

## Example

No minimum desirable streamflows have been identified and incorporated in the State water plan. However, the plan does identify several major reservoirs and watershed projects that will, if constructed, supply water for fish, wildlife, and recreational purposes [Kan. Stat. Ann. 82a-938, 82a-939]. In addition, part of the stored water in existing major reservoirs has been allocated to water quality maintenance. Water releases have been made from these reservoirs during low flow periods to protect water quality. These water quality releases have had the incidental effect of protecting instream values for fish and wildlife purposes.

## Evaluation

Reservation of storage space in reservoirs can be an effective means to obtain water for instream purposes. The procedures for allocating stored water to instream uses when supplies are inadequate for all uses are of special concern. Typically, these allocations are made on a prorata basis so that shortages are shared among all users. The basis for these allocations in Kansas has not been established.

## Sources

Gibson, G. 1981. Chief Engineer, Division of Water Resources, Kansas State Board of Agriculture. Personal Communication. 10 July.

Sheets, L. 1981. Associate Hydrologist, Kansas Water Office. Personal Communication. 10 July.

## APPROPRIATION CANCELLATIONS

### Opportunity

The Chief Engineer can cancel abandoned water rights. This can prevent resumption of uses in the future that can adversely affect instream flows. It can also result in any replacement appropriations being subject to instream flow requirements [Kan. Stat. Ann. 82a-718].

### Background

If water is not used pursuant to an appropriation for 3 consecutive years, it is considered to be abandoned and subject to cancellation by the Chief Engineer, Division of Water Resources, Kansas State Board of Agriculture [Kan.

Stat. Ann. 82a-718]. If an appropriation is cancelled, a new appropriation must be obtained if the original use is to be resumed. If instream appropriations have been acquired, or minimum desirable streamflows incorporated in the State water plan, the new appropriation is subject to those instream flow requirements.

Neither instream appropriations nor minimum desirable streamflows have been established on Kansas streams. Thus, appropriation cancellations have not been undertaken that would improve the legal status of these protected streamflows.

### Evaluation

Cancellation of abandoned appropriations is an effective mechanism for improving the legal status of protected streamflows when either instream flow appropriations or minimum desirable streamflows have been established. If cancellation does not occur, withdrawals can be resumed in the future. Because these withdrawals are based on a prior appropriation, they are not subject to subsequent instream appropriations or minimum streamflows.

Even if instream appropriations or minimum desirable streamflows are not established, appropriation cancellation can help protect instream values. If new appropriations are obtained to replace the cancelled appropriation, the new appropriations may be subject to the base flow requirements discussed earlier in this report. If the cancelled appropriation is not subject to the base flow requirement, the cancellation procedures will have, in effect, made the appropriation subject to the base flow requirement.

## APPROPRIATIVE WATER USE EFFICIENCY REQUIREMENTS

### Opportunity

The Chief Engineer can reduce the quantities of water that users are entitled to, if the users increase their efficiency of use. Water saved, that is not required by other appropriators, can be used to protect instream values [Kan. Stat. Ann. 82a-707(d)].

### Background

Appropriators are subject to the requirement of beneficial use; i.e., the water must be used without waste [Kan. Stat. Ann. 82a-707(d)]. When appropriators are using more water than they need, the Chief Engineer can modify the appropriation so that the amount of water withdrawn is limited to that amount necessary for efficient water use; i.e., use without waste [Kan. Stat. Ann. 82a-706c]. The amount of water not withdrawn from the stream by an appropriator can be used to protect instream values, unless the water is withdrawn at the same spot by later appropriators.

Part of the difficulty comes in defining what constitutes waste. Obvious waste is involved when the road ditches next to an irrigated field are full of irrigation runoff water. The Chief Engineer has required appropriators to reduce their withdrawals to avoid this obvious waste. In addition, however, the efficiency of irrigation water use can be increased dramatically by using

irrigation scheduling techniques, such as monitoring soil moisture conditions and crop water needs and timing water applications to take advantage of soil moisture availability. Whether or not use of water in excess of the amount necessary for irrigation with sophisticated irrigation techniques constitutes waste is unclear. If it does, irrigation water withdrawals can be significantly reduced with corresponding benefits to instream flows. Historically, however, Western State courts have not required irrigators to use the most innovative practices available. This suggests that legally defining waste to require use of sophisticated irrigation techniques probably requires legislative action.

### Example

The Chief Engineer routinely restricts withdrawals by appropriators to enforce water use efficiency requirements and avoid obvious waste; e.g., irrigation runoff water in road ditches. The Chief Engineer has defined waste of water to include "water which an irrigator permits to escape and drain from the authorized place of use" and "water applied to an unauthorized beneficial use in excess of the needs for such use" (Division of Water Resources 1980). If appropriations are authorized for greater quantities of water than these regulations allow, the Chief Engineer can restrict appropriations and surface water withdrawals accordingly.

### Evaluation

Increasing the efficiency of surface water use beyond the point of avoiding obvious waste can be difficult to implement if the cost of water is also increased. Improving water use efficiency through use of irrigation scheduling techniques may be expensive. If this is so, requiring improved efficiency can result in an adverse political response. In addition, if the water saved through water use efficiency requirements is withdrawn by downstream appropriators, the benefits to instream flows can be marginal. In any event, regulation by the Chief Engineer to prevent obvious waste of irrigation water can reduce withdrawals, with possible corresponding benefits to instream flows.

### Sources

- Aiken, D. A. 1980. The National water policy review and western water rights law reform. 59 Nebraska Law Review 327.
- Division of Water Resources. 1980. Rules and Regulations, Water Appropriation Act. Kansas State Board of Agriculture. 1 May.
- Gibson, G. 1981. Chief Engineer, Division of Water Resources, Kansas State Board of Agriculture. Personal Communication. 10 July.
- U.S. Department of the Interior, U.S. Department of Agriculture, and U.S. Environmental Protection Agency. 1979. Irrigation water use and management. U.S. Government Printing Office.



## WATER QUALITY REGULATIONS

### Opportunity

Activities that interfere with instream values by altering the biological character of a stream can be regulated by the Kansas Secretary of Health and Environment [Kan. Stat. Ann. 65-171d].

### Background

The Secretary of Health and Environment is authorized by statute to regulate activities causing water pollution. Kansas statutes define water pollution to include alteration of the physical, chemical, or biological qualities of water likely to injure plant, animal, or aquatic life, among other things. The Secretary of Health and Environment can regulate activities, including water diversions, that interfere with instream values related to maintenance of plant, animal, or aquatic life.

Water quality programs typically are geared toward regulating the discharge of waste into a stream. The Secretary of Health and Environment is not limited, however, to the regulation of the discharge of waste into a stream. The Secretary can also regulate any activity altering the physical, chemical, or biological qualities of a stream. Surface water withdrawals can affect a stream's biological character by reducing streamflow to the point where water temperature is increased, adversely affecting fish and other aquatic life. While regulation of water withdrawals may not have been anticipated when Kansas water quality statutes were enacted, the statutes themselves are broad enough to authorize regulation of water withdrawals to protect water quality. The fact that withdrawal can impair water quality is indicated by the Chief Engineer, Division of Water Resources, Kansas State Board of Agriculture, in the definition of waste of water to include, among other things, "any act or omission causing the unreasonable deterioration of the quality of water in any source of supply, thereby causing impairment of a person's right to use it" (Division of Water Resources 1980).

### Example

The Secretary of Health and Environment has not adopted regulations affecting water withdrawals. If such regulations are adopted, the Secretary of Health and Environment can order appropriators to stop making withdrawals where the withdrawals result in an alteration of the physical, chemical, or biological quality of water, such that fish and wildlife are adversely affected.

### Evaluation

Implementation of this alternative requires the Secretary of Health and Environment to monitor water quality conditions closely where fish and wildlife are to be protected. More significantly, implementation of this alternative will force the acknowledgment of the inconsistency of Kansas appropriation statutes and Kansas water quality statutes. Appropriators apparently may dry up a stream without regard to the impacts on fish and wildlife so long as they do not violate the terms of their permits. This may be prevented, however, where the Chief Engineer has established a base flow requirement, as discussed

earlier in this report. Water quality regulations protecting fish and wildlife can interfere with the exercise of an appropriator's water right. How this statutory inconsistency will be resolved if such regulations are pursued is unclear.

### Sources

Jensen, E. 1981. Director, Bureau of Water Quality, Division of Environment, Kansas State Department of Health and Environment. Personal Communication. 10 July.

Division of Water Resources. 1980. Rules and Regulations, Water Appropriation Act. Kansas State Board of Agriculture. 1 May.

## FISH AND GAME HABITAT ACQUISITION

### Opportunity

The Kansas Fish and Game Commission is authorized to acquire both land and water rights, through a variety of programs, for fish and wildlife purposes. Property with instream values can be acquired by the Fish and Game Commission and managed through the acquisition of water rights to protect instream values [Kan. Stat. Ann. 32-206 to 32-222, et seq.].

### Background

The Fish and Game Commission is authorized to acquire land and water rights for fish and wildlife purposes. Acquisition authorities include: (1) the authority to acquire land and water rights by purchase, gift, land exchange, or condemnation for forestry, fish and game preserves, and recreational grounds [Kan. Stat. Ann. 32-206 to 32-222]; and (2) the authority to acquire land and water rights by purchase, gift, land exchange, or, if legislatively authorized, by condemnation for the conservation of nongame, threatened, or endangered species [Kan. Stat. Ann. 32-506(a)]. These authorities can be exercised to acquire land with instream values, preventing the development of land uses interfering with instream values. Water right acquisition, however, might also be needed to ensure that upstream water development or use does not interfere with maintenance of instream values.

The Fish and Game Commission can also acquire surface or ground water appropriations to augment streamflow; attempt to purchase an existing surface water appropriation and convert it to an instream use; attempt to acquire an instream appropriation by application to the Chief Engineer, Division of Water Resources, Kansas State Board of Agriculture; or attempt to have instream flow requirements for Fish and Game Commission properties identified as minimum desirable streamflows. These alternatives are discussed earlier in this report.

### Example

While the Fish and Game Commission has acquired land for fish and wildlife purposes, it has not acquired land for the specific purpose of protecting

instream values. The Commission has, however, acquired appropriations to supplement the available water supplies for lakes and wetlands.

### Evaluation

The Fish and Game Commission has broad statutory authority to acquire land and water rights for fish, wildlife, and recreational purposes. Land acquisition can be used to prevent activities that interfere with instream values. The diversion requirement of Kansas water statutes may, however, limit the Fish and Game Commission's water right acquisition authority to appropriations involving a diversion. If this is the case, the Fish and Game Commission can acquire ground water appropriations to augment streamflow and attempt to have instream flow requirements for Fish and Game Commission properties identified as minimum desirable streamflows.

Successful implementation of this alternative depends on the availability of sufficient funds for land and water right acquisition.

### Sources

Montei, D. 1981. Chief, Game Division, Kansas Fish and Game Commission. Personal Communication. 10 July.

## LAND ACQUISITION FOR RECREATION

### Opportunity

The Kansas State Park and Resources Authority is authorized to acquire land and, in some instances, water rights for recreational, scenic, or historical preservation purposes. Property with instream values can be acquired by the Park Authority and managed by acquiring water rights to protect instream values [Kan. Stat. Ann. 74-450f, 74-4502(b)].

### Background

The Kansas State Park and Resources Authority is authorized, with legislative approval, to acquire land (including water or water rights) with recreational, scenic, or historical significance [Kan. Stat. Ann. 74-450f, 74-4502(b)]. Revenue bonds can be issued by the Park Authority to finance land acquisitions [Kan. Stat. Ann. 74-4518, 74-4502(f)].

In addition, the Park Authority is authorized to acquire, by purchase or gift, property to establish natural and scientific area preserves [Kan. Stat. Ann. 74-6608, 74-6609]. Once a preserve is established, it is left in its natural condition. Land in a preserve can be purchased or condemned by another public agency only by legislative approval and only if the Park Authority finds that such acquisition is a imperative and unavoidable public necessity [Kan. Stat. Ann. 74-6611].

Park Authority acquisition of land with instream values prevents land uses that interfere with instream values. Acquisition of water rights may be needed, however, to ensure that upstream water development or use does not interfere with instream values.

The Park Authority can acquire ground water storage appropriations to augment streamflow; attempt to purchase an existing surface water permit and convert it to an instream use; attempt to acquire an instream appropriation by application to the Chief Engineer, Division of Water Resources, Kansas State Board of Agriculture; or attempt to have instream flow requirements for Park Authority properties identified as minimum desirable streamflows. These alternatives are discussed earlier in this report.

#### Example

The legislature has authorized the Park Authority to acquire land for recreational purposes. The Park Authority has not, however, acquired land for the purpose of protecting instream values.

#### Evaluation

The Park Authority has ample legal authority to acquire property with instream values and to acquire water rights to augment streamflows to protect instream values. The legal authority to acquire instream appropriations or to convert an existing appropriation to an instream appropriation, however, is unclear. The Park Authority can also participate in designating minimum desirable streamflows by identifying instream flow requirements for Park Authority properties.

The successful implementation of this alternative depends on the availability of adequate funds for land and water right acquisition.

#### Sources

Herndon, W. 1981. Planning Coordinator, Kansas State Park and Resources Authority. Personal Communication. 10 July.

### MUNICIPAL PARKLAND ACQUISITION

#### Opportunity

Property with instream values can be acquired by cities for recreational purposes and managed, through water right acquisition, to protect instream values [Kan. Stat. Ann. 12-1301, 12-1306].

#### Background

Cities are authorized to acquire land for parks by purchase, land exchange, or condemnation. Bonds can be issued for parkland acquisition if approved by voters in a referendum [Kan. Stat. Ann. 12-1306]. These authorities can be used to acquire land with instream values for parkland. Such acquisition may prevent land uses that interfere with instream values. Water right acquisition, however, may also be needed to ensure that upstream water development or use does not interfere with maintenance of instream values.

Cities are not specifically authorized to acquire water rights, so they probably are unable to protect their parklands by acquiring instream appropriations. Cities can, however, attempt to protect instream values in parklands

through augmenting streamflow with ground water or stored water, purchasing an existing surface water appropriation and converting it to an instream use, or attempting to have instream flow requirements for parklands designated as minimum desirable streamflows. These alternatives are discussed earlier in this report.

#### Example

While cities have acquired parkland for recreational purposes, they have not acquired land for the purpose of protecting instream values. Municipalities in western Kansas, including Dodge City, have, however, acquired ground water appropriations to maintain lake levels for recreational purposes.

#### Evaluation

Cities have broad statutory authority to acquire parkland for recreational purposes. Land acquisition can be used to prevent activities interfering with instream values. Acquisition of water rights affords more complete protection of instream values in city parks.

Implementation of this alternative requires adequate funding for land and water right acquisition purposes.

#### Sources

Gibson, G. 1981. Chief Engineer, Division of Water Resources, Kansas State Board of Agriculture. Personal Communication. 10 July.

Herndon, W. 1981. Planning Coordinator, Kansas State Park and Resources Authority. Personal Communication. 10 July.

## PRIVATE OPPORTUNITIES TO PROTECT INSTREAM VALUES

### INSTREAM APPROPRIATIONS

#### Opportunity

Any individual or organization can attempt to acquire instream appropriations by direct application to the Chief Engineer [Kan. Stat. Ann. 82a-709(d)].

#### Background

Kansas law is unclear on whether or not instream water rights can be acquired by applying for a surface water appropriation to the Chief Engineer, Division of Natural Resources, Kansas State Board of Agriculture. The statutes define "appropriation right" as requiring a diversion of water [Kan. Stat. Ann. 82a-701(f)]. This provision seems to preclude acquiring an instream right from the Chief Engineer because water will not actually be diverted from the stream. However, another statute indicates that, when applying for an appropriation, the applicant must indicate rate at which water is proposed to be diverted or used [Kan. Stat. Ann. 82a-709(c)]. This section suggests that water can be appropriated for purposes not involving a diversion. In addition, other statutes clearly authorize public agencies to acquire water rights for a variety of instream purposes, including fish, wildlife, and recreation [Kan. Stat. Ann. 32-213, 32-214]. These statutes can be interpreted as authorizing instream uses if such appropriations are required to achieve the purposes of the particular public agency. If the diversion requirement applies to agencies seeking an instream appropriation, however, the agency's water right acquisition authority is limited to appropriations involving a diversion, such as augmentation by pumping ground water into the stream. It should be noted that fish and wildlife have not specifically been recognized as a beneficial use in Kansas (Brunson 1981). This statutory inconsistency has not been addressed judicially, although the Chief Engineer has informally interpreted the statutes as requiring a diversion and "recreation" to include fish and wildlife as a beneficial use (Brunson 1981).

The ambiguity over whether or not an actual diversion of water is necessary to acquire an appropriation has led to the development of procedures for legislative designation of minimum desirable streamflows for Kansas streams [Kan. Stat. Ann. 82a-703a]. This opportunity for protecting instream values is discussed later in this report.

#### Example

No person or organization has applied for an instream appropriation because of the Chief Engineer's informal advice that such an application would be denied (G. Gibson, Chief Engineer, personal communication). If an

individual or organization wants to acquire such an instream right, they apply to the Chief Engineer for an appropriation. If the application is denied, as seems likely, the Chief Engineer's decision can be appealed in court.

### Evaluation

One issue in acquiring an instream right is justifying the quantity of water to be used for instream purposes. The applicant needs to persuade the Chief Engineer that the quantity sought is reasonable. Documentation of instream flow requirements will give the Chief Engineer a stronger basis for granting the application.

Acquisition of instream rights is a powerful tool to protect instream values. The availability of this alternative under Kansas law is unclear. A court, in reviewing the statutory authorities, could conclude that, in providing statutorily for the designation of desirable streamflows, the legislature provided the exclusive means for establishing what, in effect, would be instream flow appropriations.

### Sources

Brunson, K. 1981. Letter from Stream Investigator, Kansas Fish and Game to Berton L. Lamb, Western Energy and Land Use Team, U.S. Fish and Wildlife Service. 28 October.

Gibson, G. 1981. Chief Engineer, Division of Water Resources, Kansas State Board of Agriculture. Personal Communication. 10 July.

Herndon, W. 1981. Planning Coordinator, Kansas State Park and Resources Authority. Personal Communication. 10 July.

Sheets, L. 1981. Associate Hydrologist, Kansas Water Office. Personal Communication. 10 July.

## STREAMFLOW AUGMENTATION

### Opportunity

Surface or ground water can be acquired by appropriation or by purchase to augment streamflow to protect instream values [Kan. Stat. Ann. 82a-705].

### Background

Streamflow can be augmented for instream purposes by appropriating surface or ground water, by purchasing a ground water appropriation permit and changing the purpose of use, and by purchasing stored water from the owner of a surface water reservoir.

To augment streamflow with ground water, applications are made to the Chief Engineer, Division of Water Resources, Kansas State Board of Agriculture, for a ground water appropriation [Kan. Stat. Ann. 82a-705]. The apparent diversion requirement of Kansas appropriation statutes, which makes the legal status of appropriations for instream uses somewhat ambiguous, should not pose



a problem for ground water appropriations for streamflow augmentation [Kan. Stat. Ann. 82a-701(f)] because the diversion occurs when the ground water is withdrawn.

If the ground water is to be acquired by purchase, approval of the change in the location and purpose of use needs to be obtained from the Chief Engineer [Kan. Stat. Ann. 82a-709(c)]. In this regard, the applicant needs to demonstrate that the proposed change is not unreasonable and will not impair existing appropriations and that the source of supply for the new use is the same as for the original appropriation.

If the source of water is stored water, purchase needs to be negotiated with the reservoir owner. If a purchase is negotiated, the Chief Engineer should be informed of the transaction so that appropriations can be administered accordingly [Kan. Stat. Ann. 82a-7066].

### Example

Surface and ground water appropriations have been acquired by the Kansas Fish and Game Commission to augment streamflows into State lakes and into waterfowl management areas. The Fish and Game Commission has not, however, acquired appropriations to augment streamflow (as opposed to augmenting the water in lakes or wetlands), apparently in the belief that Kansas water law does not recognize instream appropriations. The Fish and Game Commission appropriations already acquired have been used to increase the amount of water in lakes for fishing and recreational purposes or in wetlands for waterfowl management purposes. For example, 50,000 acre feet of surface water has been appropriated from the Arkansas and Wet Walnut Rivers to augment natural water supplies in the Cheyenne Bottoms waterfowl management area. A storage appropriation has been obtained on the Neosha River to maintain a natural marsh in the Neosha waterfowl management area. A ground water appropriation has been obtained to augment the water available for the Texas Lake Waterfowl Management Area and the Sheridan State Fishing Lake (Montei 1981).

### Evaluation

Use of surface or ground water to augment streamflow may be one of the more effective methods to protect instream values. An advantage of this alternative is that water can be made available to protect instream values when or where streamflow is least available. This alternative is probably a necessary supplement to other instream flow protection alternatives to deal with dry periods.

This alternative has been used by the Kansas Fish and Game Commission primarily to increase the water supply to lakes or wetlands. The option has not been used with increased streamflow as the primary objective. Failure to use the alternative for streams is based on the belief that Kansas water law requires water to be under the control of the appropriator, either by actual diversion or by storage in a lake or wetland. This interpretation does not, however, preclude the use of ground or surface water to augment streamflow incidental to augmenting the water supply in a lake or wetland. For example, a well could be located upstream from a lake or wetland. An appropriation could be obtained to supplement the water in the lake or wetland. The effect of augmenting the lake or wetland, however, would be to maintain streamflow



between the well and the lake or wetland. The water pumped from the well could serve to protect instream values, as well as supply supplemental water to the lake or wetland.

If minimum desirable streamflows are designated by the Kansas legislature, as described earlier in this report, they may provide a legal basis for augmenting streamflow during low flow periods to maintain the minimum desirable streamflow. The designation of minimum desirable streamflows is a clear exception to the widely perceived diversion requirement in Kansas water law. This apparent diversion requirement is also the reason why opportunities to augment streamflow (as opposed to augmenting water in a lake or wetland) have not been pursued. A minimum desirable streamflow designation, however, would establish, in effect, an instream appropriation for a specific quantity of water in a particular stream segment. This de facto instream appropriation possibly could be augmented by a surface or ground water appropriation, as described above, if the streamflow is insufficient to meet the minimum desired streamflow level. Specific statutory procedures to accomplish this do not currently exist. If, however, the minimum desired streamflow is perceived by the Chief Engineer as an exception to the apparent diversion requirement, as seems likely, appropriations to augment minimum desirable streamflows will probably be approved by the Chief Engineer as one way to achieve the legislative policy behind establishing the minimum desirable streamflows.

#### Sources

Division of Water Resources. 1980. Rules and Regulations, Water Appropriation Act. Kansas State Board of Agriculture. 1 May.

Gibson, G. 1981. Chief Engineer, Division of Water Resources, Kansas State Board of Agriculture. Personal Communication. 10 July.

Montei, D. 1981. Chief, Game Division, Kansas Fish and Game Commission. Personal Communication. 10 July.

### PURCHASE OF SURFACE WATER APPROPRIATION PERMITS

#### Opportunity

Instream values can be protected by purchasing a surface water appropriation and converting it to an instream use (Division of Water Resources 1980).

#### Background

Surface water rights can be acquired by purchase of an appropriation permit and the land on which the water is used [Kan. Stat. Ann. 82a-701(a)]. Appropriations can be modified by changing the location of use or the purpose of use [Kan. Stat. Ann. 82a-708b]. A person or organization wishing to protect instream flows can purchase a surface water appropriation, change the purpose of use to an instream use, and change the location of use to the stream itself.

The first step to change an appropriation permit to an instream use is to apply to the Chief Engineer, Division of Water Resources, Kansas State Board of Agriculture, for approval of the change in use. In the application, the

applicant must demonstrate that the proposed change is reasonable and will not impair existing appropriations and that the proposed change relates to the same source of water as the appropriation. If the Chief Engineer disapproves the change, the applicant can appeal that decision in court.

The purchase of the appropriation should be made conditional on approval of the change in use so that the purchase is not completed if the change in use is disapproved. Because this opportunity has not been implemented in Kansas, the likelihood of its successful implementation is unclear.

### Evaluation

One issue that affects the successful implementation of this alternative is whether or not a diversion of water is needed to maintain a valid permit. Kansas statutes define an appropriation right as a right to divert from a water supply "a specific quantity of water at a specific rate of diversion" [Kan. Stat. Ann. 82a-701(f)]. The Chief Engineer further defines diversion as the "act of bringing water under control by means of well, pump, dam or other device for delivery and distribution for the proposed use." These provisions suggest that a use must involve a water diversion in order to be effective. The instream flow applicant could argue, however, that the quantity of the appropriation to be changed has already been established, and the proposed change will not harm other permit holders because no water will be consumed.

The likelihood of successfully implementing this opportunity will be increased by the legislative designation of minimum desirable streamflows, as described earlier in this report. The minimum desirable streamflow represents a legislative exception to the apparent actual diversion rule for surface water rights in Kansas. If a minimum desirable streamflow has been established, the purchase of an appropriation can be perceived as one way to reduce withdrawals that interfere with the minimum desirable streamflow. Purchasing an appropriation permit and converting it to instream use is, in effect, helping to accomplish the legislative purpose in designating minimum desirable streamflows because it retires an appropriation that could interfere with the minimum desirable streamflow.

### Sources

Division of Water Resources. 1980. Rules and Regulations, Water Appropriation Act. Kansas State Board of Agriculture. 1 May.

Gibson, G. 1981. Chief Engineer, Division of Water Resources, Kansas State Board of Agriculture. Personal Communication. 10 July.

### PART III: PUBLIC TRUST DOCTRINE

## THE PUBLIC TRUST DOCTRINE

### OPPORTUNITY

Each State owns certain property which it holds in trust for public uses. It holds this property not as a proprietor, free to sell or exchange it at will, but as a government, that must consider and benefit the entire public in any transaction involving public trust property. The responsibility of the State as trustee is the heart of the public trust doctrine. Under this doctrine, sale or grant of this trust property to private people can be examined very carefully by the courts, which may invalidate such sales or grants if the rights of the public have been slighted.

### BACKGROUND

The public trust doctrine has the breadth and substance to be useful as a tool of general application for citizens trying to develop a comprehensive legal approach to resource management problems. It provides the concept of a legal right in the general public, it is enforceable against the government, and it can be interpreted consistently with present concerns for environmental quality. The public trust doctrine is both a source of legislative power and a court-enforced restraint on legislative and administrative power.

It is the duty of the State to exercise its control of the public trust waters within the State borders in the public interest. Cases concerning public trust rights in land can generally be applied directly to interests in water. While the doctrine is ancient, going back to the time of the Romans, vigorous application of it is relatively recent in this country. As a result, many States do not have a well developed body of case law on the public trust. This means that public trust rights in instream flow are not likely to be precluded by previous decisions, but offer a fresh new opportunity for protecting water.

As a general rule, public trust waters are navigable waters, and a division of waters into "navigable" and "nonnavigable" is another way of dividing them into public and private waters. This State power of control cannot be surrendered, alienated, or delegated, except for a public purpose or a use that is for public benefit. The power to make rules and regulations governing these navigable waters can be delegated to administrative agencies, however. This power of the State to govern and control public waters is perpetual, and all privileges or uses granted in public waters are subject to this power.

State grants and administration of water rights fall under the public trust, especially in cases in which State administration of water leads to

severe damage to public rights or use of that water. There also appears to be a definite trend to extend the public trust to waters alone, without adjacent lands, and to include nonnavigable as well as navigable waters, regardless of ownership of the stream bed. This trend affects instream flow protection, because, when diversions and other activities in the streams reduce the instream flow and the public right of use is diminished, the public trust may be violated. It may be possible, in such cases, to rectify the situation by resorting to the public trust doctrine in the courts.

Similarly, wildlife is the property of the State and may be a resource protected by the public trust doctrine in various States. If instream flows are so reduced that fish and wildlife are destroyed, it may be possible to use the public trust doctrine to restore the flows.

On the other hand, the public trust doctrine is not a sure-fire way to cure all instream flow ills. It must be examined carefully, and each State's cases and statutes on the question must be thoroughly considered by counsel.

A review of court decisions in this area results in many general statements that seem to indicate that the government can never sell or alienate trust property by giving it to a private owner and that it may not change the use to which that property has been devoted in the past. Careful study of the cases, however, shows that this language does not, in fact, determine the limits of the State's legitimate authority in dealing with its trust property. There is no general prohibition against disposition of trust properties, even on a large scale. A State can, for example, recognize private ownership in tidelands and submerged lands below the high water mark. On the other hand, courts do not look kindly on such grants and usually interpret them restrictively. What is found in the cases is neither a hair-splitting preservation of every inch of public trust property against any change nor a precise maintenance of every historical pattern of use. When the Wisconsin Supreme Court permitted a portion of Milwaukee harborland on Lake Michigan to be granted to a large steel company to build navigation facilities, it made the point clearly:

It is not the law, as we view it, that the state, represented by its legislature, must forever be quiescent in the administration of the trust doctrine, to the extent of leaving the shore of Lake Michigan in all instances in the same condition and contour as they existed prior to the advent of the White civilization in the territorial area of Wisconsin. [City of Milwaukee v. State, 193 Wisc. 423, 214 N.W. 820 (1927)]

The traditional cases do suggest that no grant can be made by the State to a private party if the grant is so large that the State effectively gives up its authority to govern. On the other hand, a grant is not illegal merely because it diminishes, to some degree, some traditional public use.

The most celebrated public trust case in American law is the decision of the United States Supreme Court in Illinois Central Railroad Company v. Illinois [146 U.S. 387 (1892)]. In 1869, the Illinois legislature made an extensive grant of submerged lands, in fee simple, to the Illinois Central Railroad. That grant included all the land underlying Lake Michigan for one

mile out from the shoreline and extending one mile in length along the central business district of Chicago. This amounted to more than 1,000 acres of incalculable value, including virtually the whole commercial waterfront of the city. By 1873, the legislature had repented of its generosity and repealed the 1869 grant. The legislature then sued to have the original grant declared invalid.

The Supreme Court upheld the State's claim and wrote one of the very few opinions in which direct conveyance of trust lands has been held to be beyond the power of a State legislature. The court did not actually prohibit the disposition of trust lands to private parties; its holding was much more limited. What a State may not do, the court said, is to divest itself of authority to govern the whole of an area in which it has responsibility to exercise its police power. To grant almost the entire waterfront of a major city to a private company is, in effect, to abdicate legislative authority over navigation.

But the mere granting of property to a private owner does not automatically prevent the exercise of governmental authority; States routinely regulate privately owned land. The court's decision makes sense only because the court determined that the States have special regulatory obligations over shorelands which are inconsistent with large-scale private ownership.

The court pointed out that the title that Illinois held to the navigable waters of Lake Michigan is:

...different in character from that which the state holds in lands intended for sale ... It is a title held in trust for the people of the state that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein free from the obstruction or interferences of private parties.

This language expresses the central theme of public trust cases. When a State holds a resource that is available for the free use of the general public, a court will be displeased with any governmental conduct that will either reallocate that resource to more restricted uses or subject public uses to the self-interest of private parties.

In the development of the public trust doctrine before and after the Illinois Central case, three types of restrictions are often imposed on governmental authority: (1) the property subject to the trust must not only be used for a public purpose, but must also be held available for use by the general public; (2) the property may not be sold, even for a fair cash price; and (3) the property must be maintained for particular types of uses. These types of uses are usually either traditional uses, such as navigation, recreation, or fishing, or uses that are, in some way, related to the natural uses peculiar to that resource. For example, San Francisco Bay can be said to have a trust enforced on it so that it can be used only for water-related uses. A dock marina might be appropriate, but filling up the bay for trash disposal is not. These three restrictions are at the center of all public trust cases.

The public trust doctrine is supported by a mixture of ideas. One recurring idea is that certain interests or resources are so important to every citizen that the free availability of the resources is imperative. Another idea in these cases is that some resources are so particularly the gift of nature that they should be preserved for the use of the entire population. This idea led to the laws of early New England reserving "great ponds" for general use. A third idea is that certain uses have a particularly public nature which makes exclusive use by private persons not appropriate. For example, it is a general rule of water law that a water user does not own property rights in water in the same way he owns the clothes on his back. He owns only a right of use, which incorporates the needs of others. Water has a public nature which makes its adaptation to entirely private use inappropriate and obliges the government to regulate water use for the benefit of the general community.

A critical question is "What lands or interests in property does the State hold?" Within each State, this question can be answered differently. With respect to waters, this question is often answered in terms of navigation. For example, the State may have declared itself the owner of all navigable waters and defined navigable waters as waters of a certain width or waters capable of supporting a certain kind of commerce. These definitions may come from the State constitution, legislation, or the courts. In each State, it is important to look at what the State owns before applying the public trust doctrine to that property, whether it is land or waters.

Some States have declared all waters to be the property of the State. Generally, however, the idea of navigability is fundamentally important to the public trust doctrine. Dividing waters into navigable and nonnavigable waters is another way of dividing them into public and private waters in many States and, therefore, into public trust and nonpublic trust waters. The Federal test for navigability for determining title to submerged lands derives from the case of The Daniel Ball [77 U.S. 557 (1871)]. This test defines public navigable rivers as those that are navigable in fact; i.e., those that are used or could be used as highways for commerce in the customary mode of trade and travel on water. Navigability, for title purposes, is to be tested as of the date of Statehood for States other than the thirteen original colonies. This test is rather vague, and capacity for use in commerce can be shown by experimentation, as well as by actual use.

States are free to impose the public trust on waters that are not navigable under Federal title standards. States can, and do, apply their own State tests of navigability to determine if waters are public for State purposes. Some States have adopted statutory definitions of navigability. For example, in Texas, the statutory test of navigability in nontitle streams is whether or not the State's stream maintains an average width of 30 feet from its mouth up. Texas holds title to streams that fit this description in trust for the people. The Michigan test of navigability is the saw log or floating log test. Under this test, a stream is navigable if it can float logs to market. In Wisconsin and Minnesota, the recreational use or pleasure boat test is used. So long as lakes or streams are capable of use for pleasure boating, they are navigable.

As the definition of navigability expands through the activity of Federal and State courts, the area of waters and lands subject to the public trust



doctrine expands. This can be seen in a recent Arkansas case. Arkansas v. McIlroy [Ark. Sup. Ct. (Docket No. 79-320, March 17, 1980)]. A riparian owner on the Mulberry River sued a number of canoeists to prevent their traveling down the river, a stream suitable for expert canoeists. The court found that the stream was floatable for 6 months of the year and expanded the Arkansas definition of "navigability in fact" from the old Federal test of commercial usefulness, which the court described as "a remnant of the steamboat era", to a new test. The court found that the stream was navigable because it could be used for a substantial portion of the year for recreational purposes. The court compared the stream with a public highway and declared that the neighboring owners could no more close the stream to travelers on such a public waterway than they could close a public highway. An interesting aspect of the case for persons interested in instream flows is that this radically expands the Arkansas definition of navigable waters and should, as a result, expand those portions of streams in Arkansas that are subject to the public trust.

Because public trust law is in a constant state of change and development, principles from other States are useful and sometimes necessary for development of another State's laws.

United States courts have generally been willing to interfere in four types of situations: (1) when public property has been disposed of at less than a fair market price when nothing indicates an obvious reason for a subsidy; (2) when authority to make resource use decisions has been granted to a private interest that may subordinate public uses to the private interest; (3) where broadly-based public uses have been reallocated to private uses or to narrower public uses; and (4) where a resource is not being used for its natural purposes.

The usefulness of the public trust doctrine in promoting instream flows can arise in the situation where a State has made an improper grant of some or all of its State-owned waters for private purposes to the detriment of the public. This might arise in several ways. A State might permit overappropriation to dry up a navigable stream. Suit can be filed against the State to cancel the permits or sales of water, based on the idea that they are invalid because they are in violation of the public trust which the State must uphold. Another example is an administrative scheme in which a bare minimum of the necessary instream flow is retained, effectively destroying the stream for public use for navigation and recreation. In this case, suit can be brought against the administrative agency of the State.

In any case, using public trust arguments for preserving instream flows involves a court suit, protracted litigation and appeals, but also possibly great rewards. The doctrine is like the reserved rights doctrine to preserve instream flows. It involves considerable costs and risks, but potentially great returns. Flows that are once declared part of the public trust are later unlikely to be allocated to private uses.

Most States have had regretful experiences with the sale of public trust property to private developers and agencies that seem to promote the interests of private developers. Many public trust cases result from efforts to retract the excessive generosity of early State legislatures and land management agencies. Several specific approaches have been adopted to deal with the broad range of public trust questions: (1) State constitution and legislative



enactments have restrained sale of trust property; (2) courts and legislatures have required that the public trust be preserved in any sales or grants; (3) sales and leases have been restricted to ensure that they are consistent with the public trust; (4) courts and legislatures have required that sales be made only for full market value and that the money from the sales is devoted to replacing the trust uses given over to private or to other Statewide public purposes; and (5) courts have read legislation narrowly to limit the power of the government to convey public trust lands and the authority of administrative agencies to dispose of them.

#### THE WISCONSIN EXAMPLE

The Supreme Court of Wisconsin has worked out a clearer meaning of the public trust doctrine than has any other State. Its cases are examples of the best use of this doctrine. The first important case, Priewe v. Wisconsin State Land and Development Co. [93 Wisc. 534, 67 N.W. 918 (1896)], invalidated a State statute permitting a promoter to drain a public lake. In later cases, the court has opposed the tendency of the State legislature and administrative agencies to subordinate public advantages to private enterprises.

The Wisconsin Supreme Court has taken the position that, when the public interest of a project is unclear, persons who promote the project must justify it and cannot simply rely on the old assumptions of legislative wisdom or administrative discretion. This justification can, in fact, be made, and the Wisconsin court, in later cases, permitted navigable waters to be converted to private land in cases where the broad impact of the change promoted public use.

The Supreme Court established five factors that are useful in evaluating situations in which the public trust doctrine may permit private control: (1) where public bodies will control the use of the area; (2) where the area will be devoted to public purposes and open to the public; (3) where the reduction of lake area will be very small when compared with the whole; (4) where public use of the lake as a lake will be destroyed or greatly impaired; and (5) where the disappointment of those members of the public who may desire to boat, fish, or swim in the area to be filled is negligible when compared with the greater convenience afforded those members of the public trust who use the city park [State v. Public Service Comm'n 275 Wisc. 112, 81 N.W.2d 71 (1957)].

The result of establishing these five factors is that administrative agencies must show, from time to time, that they possess the expertise and concern for the public interest that they claim to hold.

Wisconsin has also developed a line of cases in which the court has held that the governmental body whose decisions are being questioned does not represent the public interest at large. A municipal act might possibly be struck down because the subject matter of the act is a Statewide concern and can be affected only by the State legislature.

In Wisconsin practice, the use of the public rights doctrine seems to be a way of saying that public interest in recreation is one of the most important State's interests to be protected by water law. The public trust is a method

used by the courts to protect this interest. The balancing of costs and benefits under this approach can permit, for instance, filling in part of a lake or a park or granting a substantial area of harbor to a steel company for docks and loading facilities.

## NEBRASKA

The usefulness of the public trust doctrine in promoting instream flows can arise in a situation where the State has made an improper grant of some or all of its State-owned waters for private purposes, to the detriment of the public. This can arise in several ways. The State may have permitted over-appropriation to dry up a navigable stream. In this case, suit can be filed by or against the State to cancel those permits or sales of water, based on the idea that they are invalid because they are in violation of the public trust, which the State must uphold. Another example is an administrative scheme in which a bare minimum of the necessary instream flows is retained, effectively destroying the stream for public use for navigation and recreation. In this case, suit can be brought against the administrative agency of the State.

The public trust doctrine has not been used in Nebraska to protect public fishing and navigation rights. Nebraska Supreme Court Decisions have recognized a public right of navigation on Nebraska streams. The Nebraska Supreme Court has not, however, addressed the extent to which the State can, for example, authorize surface water appropriations that interfere with public values for fishing and navigation.

If this approach is implemented, the first step is to object in administrative proceedings where State property is proposed to be sold for use incompatible with public values in fishing or navigation or where State authority is to be given for activities incompatible with public values in fishing or recreation. The objective in intervening is to demonstrate how the proposed activity will interfere with public trust values and to persuade the decisionmaker that public trust values should be protected. If the activities interfering with public trust values are authorized, the administrative action can be appealed in court.

The public trust doctrine provides an attractive legal theory to protect instream values. The doctrine does not compel such a result, however. As a practical matter, a court is unlikely to overturn administrative activities clearly contemplated and authorized by the legislature, unless changed circumstances have obviously rendered the statute inappropriate. The public trust doctrine can be used more effectively as an argument to support State activities protecting instream values when such activities are challenged in court. If, for example, the Nebraska Game and Parks Commission is attempting to obtain an instream flow appropriation, the public trust doctrine can be used as an additional argument in support of the Commission's efforts.

## KANSAS

While the public trust doctrine has not yet been used to preserve stream-flows in Kansas, the Supreme Court has not rejected it as a possible way to

protect the public interest in Kansas waters. The most appropriate setting for raising the doctrine is in a lawsuit involving State administrative practices in permitting water use. When private uses substantially impair public resources, the Kansas courts can recognize and protect the public trust.

#### Sources

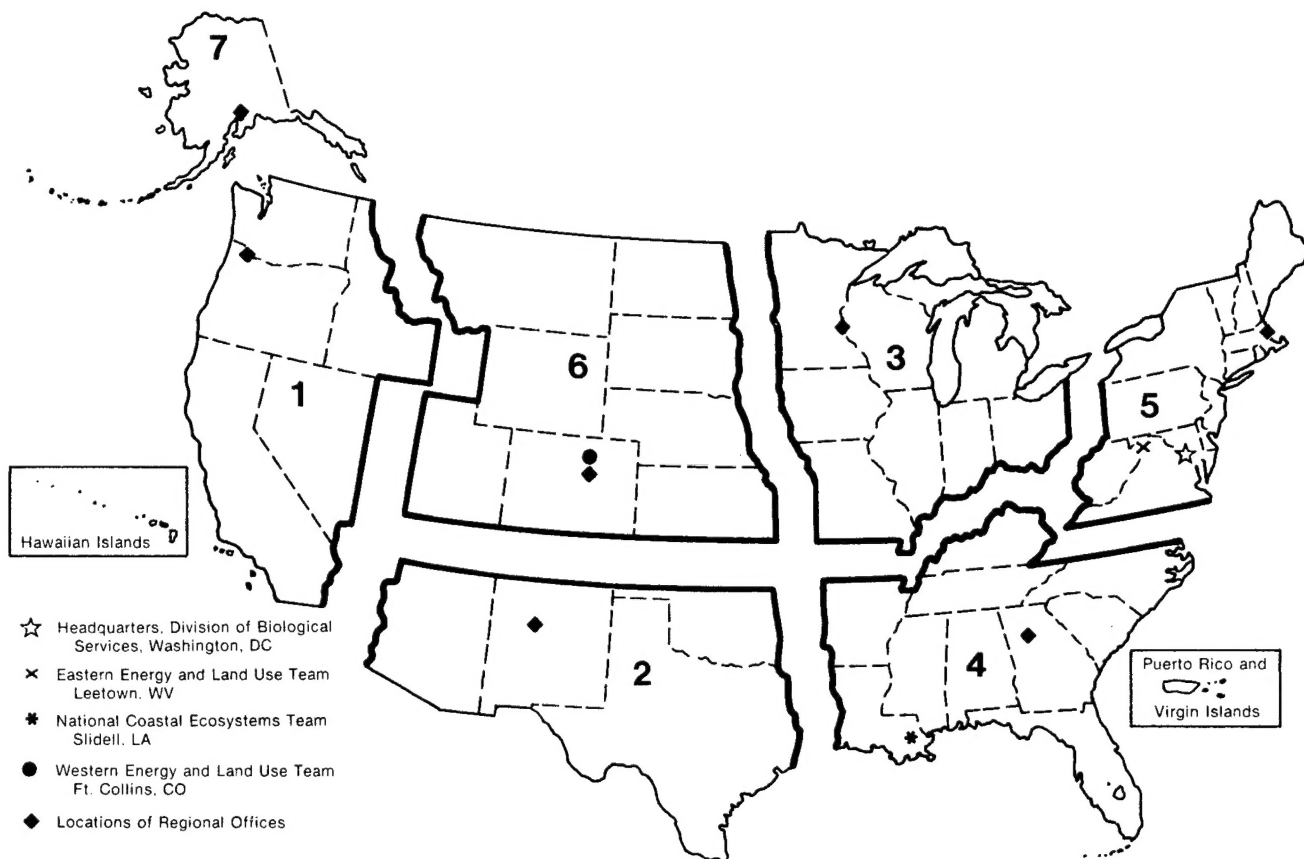
Althaus, H. S. 1978. Public trust rights. Prepared for Regional Solicitor, Portland Region, U.S. Department of the Interior. November.

Sax, J. L. 1970. The public trust doctrine in natural resource law; effective judicial intervention. 68 Michigan Law Review 473.

Smith, F. E. 1980. The public trust doctrine, instream flows and resources: a discussion paper. Prepared by the California Water Policy Center, U.S. Fish and Wildlife Service, California-Nevada Area Office. March.

Trelease, F. J. 1974. Water law: resource use and environmental protection. 2nd Edition. St. Paul, MN. West Publishing Co.

<b>REPORT DOCUMENTATION PAGE</b>		1. REPORT NO. FWS/OBS-83/02	2.	3. Recipient's Accession No.
4. Title and Subtitle Opportunities To Protect Instream Flows In Nebraska And Kansas			5. Report Date February 1983	
			6.	
7. Author(s) J. David Aiken			8. Performing Organization Rept. No.	
9. Performing Organization Name and Address Cooperative Instream Flow Service Group Western Energy and Land Use Team U.S. Fish and Wildlife Service Drake Creekside Building One 2627 Redwing Road Fort Collins, CO 80526			10. Project/Task/Work Unit No.	
			11. Contract(C) or Grant(G) No. (C) 14-16-009-79-100 (G)	
12. Sponsoring Organization Name and Address Western Energy and Land Use Team Division of Biological Services Research and Development Fish and Wildlife Service U.S. Department of the Interior Washington, DC 20240			13. Type of Report & Period Covered	
			14.	
15. Supplementary Notes				
16. Abstract (Limit: 200 words)  This publication is one of a series of similar documents for western and midwestern States that provides a basis survey of State prerogatives and programs that may be used to protect the instream uses of water. Most of the opportunities for protecting instream flows are related to fish and wildlife habitat, although many other instream uses are considered, including hydroelectric power production, recreation, navigation, downstream delivery, and waste load assimilation. These documents illustrate methods to protect instream uses within the context of existing rules and regulations.				
17. Document Analysis a. Descriptors Water conservation, water flow, water law, water resources, water rights, watersheds, water supply, habitability, hydroelectric power generation.  b. Identifiers/Open-Ended Terms Nebraska Kansas Instream flows  c. COSATI Field/Group				
18. Availability Statement Unlimited			19. Security Class (This Report) UNCLASSIFIED	
			21. No. of Pages ii - xxi +57pp	
			20. Security Class (This Page) UNCLASSIFIED	
			22. Price	



#### **REGION 1**

Regional Director  
U.S. Fish and Wildlife Service  
Lloyd Five Hundred Building, Suite 1692  
500 N.E. Multnomah Street  
Portland, Oregon 97232

#### **REGION 2**

Regional Director  
U.S. Fish and Wildlife Service  
P.O. Box 1306  
Albuquerque, New Mexico 87103

#### **REGION 3**

Regional Director  
U.S. Fish and Wildlife Service  
Federal Building, Fort Snelling  
Twin Cities, Minnesota 55111

#### **REGION 4**

Regional Director  
U.S. Fish and Wildlife Service  
Richard B. Russell Building  
75 Spring Street, S.W.  
Atlanta, Georgia 30303

#### **REGION 5**

Regional Director  
U.S. Fish and Wildlife Service  
One Gateway Center  
Newton Corner, Massachusetts 02158

#### **REGION 6**

Regional Director  
U.S. Fish and Wildlife Service  
P.O. Box 25486  
Denver Federal Center  
Denver, Colorado 80225

#### **REGION 7**

Regional Director  
U.S. Fish and Wildlife Service  
1011 E. Tudor Road  
Anchorage, Alaska 99503



## **DEPARTMENT OF THE INTERIOR**

### **U.S. FISH AND WILDLIFE SERVICE**



As the Nation's principal conservation agency, the Department of the Interior has responsibility for most of our nationally owned public lands and natural resources. This includes fostering the wisest use of our land and water resources, protecting our fish and wildlife, preserving the environmental and cultural values of our national parks and historical places, and providing for the enjoyment of life through outdoor recreation. The Department assesses our energy and mineral resources and works to assure that their development is in the best interests of all our people. The Department also has a major responsibility for American Indian reservation communities and for people who live in island territories under U.S. administration.